Supreme Court, U.S.
FILED

97 • 367 AUG 1 2 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court Of The United States

October Term, 1997

EUGENE LUMPKIN, JR.,

Petitioner,

v.

WILLIE L. BROWN, MAYOR OF THE CITY AND COUNTY OF SAN FRANCISCO, CITY AND COUNTY OF SAN FRANCISCO

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

James D. Struck
THE STRUCK FIRM
Counsel of Record
1411 G Street
Modesto, California 95354
(209) 574-1440

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

August 12, 1997

QUESTIONS PRESENTED FOR REVIEW

I. Whether a government employee may be terminated solely for public statements he made concerning his personal religious beliefs, where the Supreme Court has held that the freedom to hold and profess religious beliefs is absolute.

II. Whether the *Pickering* test is the appropriate analysis to be employed when the government seeks to assert its interest in maintaining orderly administration against the right of a government employee to publicly profess his personal religious beliefs, where the Supreme Court has never applied the *Pickering* test in the context of free exercise of religion.

III. Whether the District Court and the Ninth Circuit Court of Appeals improperly administered the *Pickering* test to allow the government to terminate an employee solely for public statements made clarifying his personal religious beliefs, where the government acknowledged that his job performance was exemplary in every respect, the statements did not amount to advocacy against his employer's interests, and the record does not reflect that the orderly administration of the government's interests was impaired in any way.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

A. Standard of Review 2

B. Statement of the Facts 3

C. Proceedings and Decisions in the Courts Below 8

REASONS FOR GRANTING THE WRIT 9

I. THE RIGHT TO RELIGIOUS BELIEF AND PROFESSION IS ABSOLUTE. 10

A. Religious Freedom Consists of Two Components: the Right to Hold and Profess Beliefs, and the Right to Act. 10

B. The Supreme Court has Repeatedly Decreed that the Right to Religious

Belief is Absolute. 12

C. The Right to Profess Religious Belief is Inherent Within the Absolute Right to Believe. 15

II. REVEREND LUMPKIN WAS TERMINATED FOR ABSOLUTELY PROTECTED PROFESSION OF BELIEF. 16

III. THE DISTRICT COURT AND NINTH CIRCUIT MISAPPLIED THE *PICKERING* TEST IN RULING AGAINST LUMPKIN. 23

CONCLUSION 29

APPENDIX ..... A-i

TABLE OF AUTHORITIES

Cases **Page(s)**

Baz v. Walters, 782 F.2d 701 (7th Cir. 1986) 10, 23

Brandenburg v. Ohio, 395 U.S. 444 (1969) 24

Branti v. Finkel, 445 U.S. 507 (1980) 23, 28

Braunfeld v. Brown, 366 U.S. 599 (1961) 13

Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995) (*en banc*), *cert. denied*, 116 S. Ct. 1042 (1996) 10

Buckley v. Valeo, 424 U.S. 1 (1976) 24

Cantwell v. Connecticut, 310 U.S. 296 (1940) 11-12, 14, 24, 25

Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) 24

Connick v. Myers, 461 U.S. 138 (1983) 3, 25-27

Elrod v. Burns, 427 U.S. 347 (1976) 9, 24, 27, 28

Employment Div. Dep't. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) ... 11, 13, 16, 17, 24

Everson v. Bd. of Educ. of the Township of Ewing, 330 U.S. 1 (1947) 13

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 25

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, ____ U.S. ____, 115 S. Ct. 2338 (1995) 26

Lockhart v. McCree, 476 U.S. 162 (1986) 22, 23

Lumpkin v. Brown, 109 F.3d 1498 (9th Cir. 1997) (*petition for en banc* hearing denied) ... 2, 9, 22, 23, 26, 27

Lumpkin v. Jordan, Docket No. C-93-4338 FMS, 1994 U.S. Dist. LEXIS 17280 (N.D. Cal. Nov. 28, 1994) 2, 22, 27

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 22

McDaniel v. Paty, 435 U.S. 618 (1978) 12-13, 23, 28

Minersville School District v. Gobitis, 310 U.S. 586 (1940) 14

NAACP v. Alabama, 357 U.S. 449 (1958) 24

NAACP v. Button, 371 U.S. 45 (1963) 24

Pennekamp v. Florida, 328 U.S. 331 (1946) 3

Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, 391 U.S. 563 (1968) 9, 10, 23, 25

R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992) 26

Rankin v. McPherson, 483 U.S. 378 (1987) 21, 29

Reynolds v. United States, 98 U.S. 145 (1879) 11-13

Shahar v Bowers, 114 F.3d 1097 (11th Cir. 1997) 23

Sherbert v. Verner, 374 U.S. 398 (1963) 13

Torcaso v. Watkins, 367 U.S. 488 (1961) 12-15, 23, 28

Tucker v. State of California Dep't of Educ., 97 F.3d 1204 (9th Cir. 1996) 10

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1942) 12-15

Witherspoon v. Illinois, 391 U.S. 510 (1968) 23

Wooley v. Maynard, 430 U.S. 705 (1977) 15, 16

Statues, Regulations and Rules

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 9

28 U.S.C. § 1331 8

28 U.S.C. § 1441(b) 8

42 U.S.C. § 1983 2

California Constitution, Article I, § 4 2

California Constitution, Article I, § 8 2

California Gov't Code § 12926(c),
The Employment Code 2

California Gov't Code § 12940,
California Fair Employment and Housing Act 2

San Francisco Administrative Code,
Human Rights Commission, § 12.A.4. ..... 3, 7

U.S. Constitution Article VI 2, 15

U.S. Constitution, Amendment I 2, 25

U.S. Constitution, Amendment XIV 2

Other Sources

Channel 2 Interview of Reverend Eugene Lumpkin, Jr.,
August 20, 1993 ..... 5, 18-20

Declaration of Reverend Eugene Lumpkin, Jr. in
Opposition to Motion for Summary Judgment filed in the
U.S. District Court for the Northern District of California,
October 7, 1994, No. C93-4338 FMS 5-7

History of Hostility: Bias from Within Against Black Gays,
Evelyn C. White, San Francisco Chronicle,
June 26, 1993, A1 ..... 4, 17, 18

Joint Statement of Undisputed Facts in Support of
Defendants' Motion for Summary Judgment filed in the

U.S. District Court for the Northern District of California, October 28, 1994, No. C93-4338-FMS 4

Mayor Jordan Press Release, Dated July 13, 1993 ..... 4, 19, 21-22, 25, 27

Mayor Jordan Press Release, Dated August 20, 1993 ..... 4, 6, 7, 20

Mayor Jordan Press Release, Dated August 23, 1993 ..... 4, 7-9, 17, 20-21

Separation of Church and State, Robert L. Cord, 114 (1982) 11

Webster's New World Dictionary (1986), Second College Edition 17

No.

In The

Supreme Court Of The United States

October Term, 1997

EUGENE LUMPKIN, JR.,

Petitioner,

v.

WILLIE L. BROWN, MAYOR OF THE CITY AND COUNTY OF SAN FRANCISCO, CITY AND COUNTY OF SAN FRANCISCO

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Eugene Lumpkin, Jr., respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court granting summary judgment to the City and County of San Francisco on certain issues and abstaining as to certain other issues.

OPINIONS BELOW

The one unpublished district court opinion and the one published Court of Appeals opinion in dispute are found at *Lumpkin v. Jordan*, Docket No. C-93-4338 FMS, 1994 U.S. Dist. LEXIS 17280 (N.D. Cal. Nov. 28, 1994) (*Lumpkin I*) and *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997) (*petition for en banc* hearing denied) (*Lumpkin II*). All opinions are reprinted in the Appendix (hereinafter "App.") attached to this Petition.

JURISDICTION

Review is sought from the decision of the United States Court of Appeals for the Ninth Circuit entered April 3, 1997 and the order denying Petitioner's request for a rehearing and a rehearing *en banc*, entered May 14, 1997. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in the Appendix hereto are U.S. Constitution Article VI and Amendments I and XIV; 42 U.S.C. § 1983; Article I, §§ 4 and 8 of the California Constitution; California Government Code § 12940, California Fair Employment and Housing Act; and California Government Code § 12926(c), The Employment Code.

STATEMENT OF THE CASE

A. Standard of Review

Because the courts below utilized a balancing test

involving speech, the Supreme Court reviews *de novo* the facts at issue and the application of law thereto.

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

Connick v. Myers, 461 U.S. 138, 150 n. 10 (1983) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

B. Statement of the Facts

Reverend Lumpkin, the pastor of Ebenezer Baptist Church and a longtime acquaintance of the Mayor of San Francisco, Frank M. Jordan, was appointed by Mayor Jordan to the Human Rights Commission ("HRC") on August 13, 1992, for a term that would last approximately two years. S.F. Admin. Code. Human Rights Commission, § 12.A.4. (App. A-69). This constituted a civil service appointment, by which Lumpkin became an employee of the City and County of San Francisco ("CCSF"). Civil Minute Order, (App. A-33). Lumpkin received compensation for each meeting of the HRC that he attended. S.F. Admin. Code. Human Rights Commission, § 12.A.4. (App. A-69).

In June of 1993, Reverend Lumpkin was quoted in a local newspaper regarding his personal religious beliefs. As an

African American pastor, he was questioned on homosexuality in the context of acceptance of gay men among the African American community. Evelyn White, *History of Hostility: Bias from Within Against Black Gays*, S.F. Chron., June 26, 1993, A1, (App. A-37).[1] In the wake of ensuing controversy, Mayor Jordan issued a press release on July 13, 1993, in which he affirmed Lumpkin's constitutional right to express his religious beliefs and highlighted Lumpkin's "solid and unambiguous record as a member of the Human Rights Commission," stating that "[a]s a commissioner he has protected and advanced gay and lesbian civil rights." Press Release, Mayor Jordan's Office, July 13, 1993, (App. A-40) (hereinafter "P.R. July 13"). The Mayor and the CCSF stipulated below that the July 13, 1993 press release "accurately reflected the Mayor's beliefs and actions regarding Reverend Lumpkin's tenure on the HRC as of that date," Joint Statement of Undisputed Facts, Oct. 28, 1994, (App. A-30) (hereinafter "J.S."). *This stipulation is the only direct evidence in the record below regarding Mayor Jordan's state of mind with respect to Lumpkin.* Subsequent press releases by the Mayor's office were merely authenticated without direct (non-hearsay) testimony concerning their substantive content. Press Release, Mayor Jordan's Office, August 20, 1993, (App. A-51-52) (hereinafter "P.R. Aug. 20") and Press Release, Mayor Jordan's Office, August 23, 1993, (App. A-53-54) (hereinafter "P.R. Aug. 23").

---

[1] Reverend Lumpkin was quoted in the June 26, 1993, *San Francisco Chronicle* article as follows:

"'It's sad that people have AIDS and what have you, but it says right there in the scripture that the homosexual lifestyle is an abomination against God,' said the Rev. Eugene Lumpkin, pastor of the Ebenezer Baptist Church in San Francisco. 'So I have to preach that homosexuality is a sin.'" (*See* the article in its entirety in App. A-37).

Nothing in the record reflects that Lumpkin's "solid" and "unambiguous" record on gay and lesbian issues as a Human Rights Commissioner changed between the date Mayor Jordan issued the statement, July 13, 1993 and the date that Mayor Jordan terminated Lumpkin, August 23, 1993. The only significant intervening event between those two dates was Lumpkin's appearance on a local television show on August 20, 1993 to clarify the statement he made in the newspaper. Interview with Reverend Eugene Lumpkin, Jr., Pastor of Ebenezer Baptist Church, San Francisco, CA (August 20, 1993) (App. A-42-46) (hereinafter "Interview"). In a five minute discussion which included inquiries into Reverend Lumpkin's personal beliefs, his role as a pastor, his compassion for homosexuals with AIDS and his record as a Human Rights Commissioner, Lumpkin clearly distinguished his personal religious views on homosexuality as a pastor from his commitment as a Human Rights Commissioner to uphold the rights of all San Franciscans. *Id.*

Later that same day, Mayor Jordan informed Lumpkin by telephone that he had heard Lumpkin advocated violence against gays and lesbians during a live television interview, and that Mayor Jordan wanted Lumpkin to resign. Declaration of Reverend Eugene Lumpkin, Jr., Oct. 7, 1994, (App. A-48) (hereinafter "Decl."). Lumpkin informed the Mayor that the representation was not accurate, that Lumpkin did not advocate and never had advocated such violence, and that his remarks, which were concerning a passage in the book of Leviticus in the Bible, were either misunderstood or misinterpreted. Decl., (App. A-49). When asked to clarify his comments, Lumpkin explained:

> I meant that I believed that is what the Bible said, and that the passage did in fact state the law that was in

> effect at that time; I did not state that I believed that this was now or should be the law, nor did I state that homosexuals should be killed or harmed.

Decl., (App. A-49). Reverend Lumpkin asked the Mayor for an opportunity to explain his position, and arrangements were made for a breakfast meeting on August 23, 1993. Decl., (App. A-49).

Despite his professed willingness to consider Lumpkin's explanation further on August 23rd, and without having reviewed the tape of the interview, the Mayor immediately issued a press release on the same day, August 20th, in which he again called for Lumpkin's resignation. P.R. Aug. 20, (App. A-51-52). In the press release, the Mayor characterized Lumpkin's statements as advocacy of violence toward homosexuals based upon Lumpkin's failure to disassociate himself from Biblical passages regarding homosexuality:

> While religious beliefs are constitutionally protected and cannot be the grounds to remove anyone from elected or appointed public office, the *direct or indirect advocacy of violence is not, cannot and will not be condoned by this administration.*
>
> Reverend Lumpkin, *by affirming his literal interpretation of the Bible* this morning on a television talk show, *implied that stoning to death was the appropriate punishment for violation of 'God's law'* as stated in the Book of Leviticus.
>
> *His direct response 'That is what the Bible teaches'* to the question whether or not stoning is justified punishment for homosexuality *is insufficient to distance*

> *himself from the violence inherent in the biblical passage.*

P.R., Aug. 20, (App. A-51) (Emphases added).

At the August 23rd breakfast meeting, Lumpkin reiterated to the Mayor that he was strongly opposed to violence against gays, lesbians and bisexuals, that he did not believe that there should be a death penalty for homosexuals, and that he would continue to uphold all the provisions of the Charter of the Human Rights Commission.[2] Decl., (App. A-49). Lumpkin also offered to assist in any way he could to publicly clarify his beliefs in this area. Decl., (App. A-49-50). The Mayor continued to insist on Lumpkin's resignation, and when he refused to do so, the Mayor informed him that he would be terminated from his position as a Human Rights Commissioner. Decl., (App. A-50).

Later that day, August 23rd, Mayor Jordan's office issued a press release reiterating the Mayor's assertion that Lumpkin had impliedly justified violence by failing to disassociate himself from particular Biblical passages:

> Religious beliefs are still sacrosanct in this country and are given the broadest range of protection. But *when those beliefs are volunteered in a way that negatively influences the operation of a state function, or suggests a justification for actions which may lead to violence*, I believe it crosses the line between church and state.
>
> Reverend Lumpkin chose to make his beliefs a part of

---

[2] Chapter 12A of the San Francisco Administrative Code, (App. A-66).

> the political process, and in so doing crossed the line from belief to behavior advocacy. Reverend Lumpkin, *by failing to disassociate himself from specific biblical passages which may appear to justify stoning persons or groups of people, implied that he condoned physical harm.*
>
> [N]o person will be allowed to serve in my administration *whose actions may be interpreted by some to encourage violence or give support to others who seek to justify hatred.*

P.R., Aug. 23, (App. A-54) (Emphases added).

At no time between Reverend Lumpkin's statements and his termination was an HRC meeting called or held. The Mayor fired Lumpkin solely because of personal religious beliefs, his profession thereof, and the alleged public response thereto.

C. Proceedings and Decisions in the Courts Below

On October 18, 1993, Lumpkin commenced this action in the San Francisco County Superior Court after receiving a "right to sue letter" from the California Department of Fair Employment and Housing. The Mayor and CCSF filed a Notice of Removal of Action Under 28 U.S.C. § 1441(b) on December 8, 1993. The United States District Court for the Northern District of California exercised original jurisdiction over this case pursuant to 28 U.S.C. § 1331.

On August 16, 1994, Reverend Lumpkin filed an Amended Complaint for Discrimination and Violations of Civil Rights. On September 23, 1994 the Mayor and CCSF

filed a Motion for Summary Judgment. On November 22, 1994, the District Court granted the CCSF's Motion for Summary Judgment on the grounds that as a government employee under the "policymaking" exception to the rule against patronage dismissals enunciated in *Elrod v. Burns*, 427 U.S. 347 (1976), Lumpkin could be fired for personal statements on matters of public concern. P.R. Aug. 23, (App. A-54).

On July 9, 1997, Lumpkin filed a timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. The jurisdiction of the court was founded on 28 U.S.C. § 1291. The Court of Appeals affirmed the District Court's Order for Summary Judgment on the grounds that as an employee of the CCSF, Lumpkin did not have a First Amendment claim "when he preaches homophobia while serving as a City official". *Lumpkin II*, 109 F.3d at 1503, (App. A-19).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the federal courts are increasingly using the balancing test enunciated in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563, 568 (1968) (referred to herein as "the *Pickering* test") to review governmental employment decisions based upon an employee's exercise of religion, a context for which it was not specifically developed and for which it is not suited.

The *Pickering* test had its genesis in the context of free speech, assisting courts

> to arrive at a balance between the interests of the [public employee] in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs.

Id. at 568. The Courts of Appeals, however, have begun to employ the test to balance the interests of government employers against the religious freedom rights of employees. For example, the Court of Appeals for the Seventh Circuit used the *Pickering* test in *Baz v. Walters* to resolve a conflict between a chaplain's free exercise rights to proselytize to patients and his V.A. hospital employer's interest in promoting the efficiency of the public services it performed. 782 F.2d 701, 708 (7th Cir. 1986). The Court of Appeals for the Eighth Circuit used the test in *Brown v. Polk County* to strike down certain restrictions on keeping religious objects in the workplace and making religious references. 61 F.3d 650, 658 (8th Cir. 1995) (*en banc*), *cert. denied*, 116 S. Ct. 1042 (1996). Before the instant case, the Ninth Circuit had applied the *Pickering* test in *Tucker v. State of California Department of Education* to strike down restrictions on a public employee's expression of his religious views. 97 F.3d 1204, 1210 (9th Cir. 1996). The present case squarely presents the question whether such a balancing test is appropriately applied to an employee's right to merely hold and profess religious beliefs, which the Court has repeatedly termed "absolute".

I. THE RIGHT TO RELIGIOUS BELIEF AND PROFESSION IS ABSOLUTE.

A. Religious Freedom Consists of Two Components: the Right to Hold and Profess Beliefs, and the Right to Act.

Religious freedom guaranteed by the First Amendment contains two distinguishable components: a freedom to believe and a freedom to act. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Thomas Jefferson recognized the distinction in his letter to the Danbury Baptist Association (famous for its phrase "wall of separation between church and State"), in which he wrote, "the legislative powers of the government reach actions only, and not opinions."[3]

This distinction between these two components of religious freedom has been recognized throughout the history of constitutional jurisprudence. In rejecting the proposition that the First Amendment's guarantee of religious freedom protected the practice of polygamy, the Court distinguished between religious belief and religious practices in *Reynolds v. United States*, 98 U.S. 145, 166 (1879): "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." The opinion of the Court in *Cantwell* provides the classic construction of these two components of religious freedom: "[t]he Amendment embraces two concepts, -- freedom to believe and freedom to act." 310 U.S. at 303. More recently, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), (hereinafter "*Smith*"), harkened back to *Reynolds* and built upon its foundation, distinguishing between "belief and profession"[4] on the one hand and "the performance of (or abstention from) physical acts" on

---

[3] Letter from Thomas Jefferson to the Danbury Baptist Association, *quoted in Reynolds v. United States*, 98 U.S. 145, 164 (1879). *See generally*, Robert L. Cord, Separation of Church and State, 114-16 (1982).

[4] *Smith*, 494 U.S. at 877.

the other.[5]

B. The Supreme Court has Repeatedly Decreed that the Right to Religious Belief is Absolute.

The right to believe has been characterized by the Court on numerous occasions as an "absolute" right. "Thus the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is *absolute*. . . ." *Cantwell*, 310 U.S. at 303 (emphasis added). "Congress was deprived of *all* legislative power over mere opinion" *Reynolds*, 98 U.S. at 164 (emphasis added); "Laws . . . cannot interfere with mere religious belief and opinions." *Id.* at 166.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or

---

[5] *Id.; cf. McDaniel v. Paty*, 435 U.S. 618, 629 (1978) in which the Court held that a Tennessee statute barring clergy from serving as delegates to the State's constitutional convention burdened the religious conduct of a Baptist minister rather than his religious belief, but was nevertheless unconstitutional. The distinction between belief and conduct was a significant part of the analysis because if McDaniel's status as a minister was defined by his beliefs, then the rule against governmental regulation of religious beliefs would control. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

> > If the Tennessee disqualification provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, our inquiry would be at an end. The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.
>
> *McDaniel*, 435 U.S. at 626.

act their faith therein.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1942). "No person can be punished for entertaining or professing religious beliefs or disbeliefs." *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 15-16 (1947). "The freedom to hold religious beliefs and opinions is absolute." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (emphasis in original). "The Free Exercise Clause *categorically prohibits* government from regulating, prohibiting or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (emphasis added). The Court has recognized "the Free Exercise Clause's *absolute prohibition* of infringements on the 'freedom to believe' . . . ." *Id.* at 627 (emphasis added). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877.

Because the right to believe and profess is absolute, the Court on numerous occasions has specifically warned against attempts to coerce belief. "Laws . . . cannot interfere with mere religious belief and opinions." *Reynolds*, 98 U.S. at 166;

> Neither [a state nor the Federal Government] can force . . . [a person] to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs.

Everson, 330 U.S. at 15-16 (1947); "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in

any religion.'" *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (citation omitted).

Where the Court has confronted attempted governmental restrictions on the right to believe and profess, no balancing test is applied, for the power to limit the profession of belief, absent a showing by the government of imminent danger of lawless action, is completely beyond the purview of the State. For example, in *Cantwell*, the Court struck down a content-based ordinance purporting to regulate religious solicitation, holding that while the State is free to regulate the time and manner of solicitation generally, "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license . . . is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U.S. at 307.[6] Likewise, in *Barnette*, the Court overruled its decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), which had upheld flag salutes in part because allowing religious dissent "might introduce elements of difficulty into the school discipline."[7] The *Barnette* Court categorically rejected this argument, observing that

> freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.

---

[6] On the other hand, the conviction of one of the *Cantwell* defendants for breach of peace based upon his sidewalk proselytizing was subjected to a balancing test between the defendant's free exercise of religion and the state's interest in the preservation of peace and good order. *Id.* In the absence of evidence that the defendant's conduct was disorderly or so abusive as to imminently incite riot, the defendant's right to speak prevailed. *Id.* at 311.

[7] *Barnette*, 319 U.S. at 635, n. 16, quoting *Gobitis*, 310 U.S. at 599-600.

> They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

319 U.S. at 624.

C. The Right to Profess Religious Belief is Inherent Within the Absolute Right to Believe.

This Court has often recognized and affirmed that the right to believe and the right to profess belief (or to refrain from doing so) are indissolubly linked. Justice Murphy's concurrence in *Barnette* emphasized:

> The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all. . . .

319 U.S. at 645.

In *Torcaso*, the Court struck down the requirement that all office holders in the State of Maryland declare a belief in the existence of God. 367 U. S. at 496. The Court's decision was grounded neither in the Free Speech Clause nor in the United States Constitution's prohibition against religious test oaths;[8] rather, the Court found that the "religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." *Id.* at 496. Likewise, in *Wooley v. Maynard*, 430 U.S. 705, 713 (1977), the Court precluded New Hampshire from forcing its citizens to display the state motto, "Live Free or Die," on

---

[8] U.S. Const. Art. VI., cl. 4.

automobile license plates over their religious objections. "[T]he State may [not] constitutionally require an individual to participate in the dissemination of an ideological message." *Id.* at 713.

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.

Id. at 714.

The text of *Smith,* which relies upon the distinction between religious belief and religious action, clearly includes the right to profess belief within the right to believe. In both instances where the right to believe is invoked by the Court in *Smith*, it is linked with the right to profess: "The free exercise of religion means, first and foremost, the right to believe *and profess* whatever religious doctrine one desires." *Smith,* 494 U.S. at 877 (emphasis added).

> [T]he "exercise of religion" often involves not only belief *and profession* but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.

Id. (Emphasis added).

II. REVEREND LUMPKIN WAS TERMINATED FOR ABSOLUTELY PROTECTED PROFESSION OF BELIEF.

A careful reading of the quotation from *Smith* immediately preceding this section leads to the conclusion that religious speech is sometimes classified as profession[9] of belief and sometimes as advocacy[10] or action. For example, the Court in *Smith* classifies another form of religious speech, "proselytizing," as religious action.[11] Hence, the Court in *Smith* suggests that religious speech is afforded different levels of constitutional protection depending upon its proper classification either as mere profession of belief or as action.

The controversial portions of Lumpkin's television interview are simply professions of his religious belief, and cannot be construed as "proselytizing" or religious advocacy of any kind. Despite the attempt by Mayor Jordan's office to "spin" Lumpkin's statements as advocating violence, the transcript of the television interview plainly demonstrates that Lumpkin did not at any time "cross the line from belief to behavior advocacy." P.R. Aug. 23, 1993, (App. A-54). The questions prompting the controversial statements dealt with Lumpkin's personal religious beliefs. Lumpkin's personal religious beliefs had become a matter of public concern because nearly two months earlier, the San Francisco Chronicle had printed a story on the acceptance of homosexual African American men within the African American community. *See* Evelyn C. White, *History of Hostility: Bias From Within*

---

[9] "Profess" means "to make an open declaration of, affirm" or "to declare one's belief in." Webster's New World Dictionary (1986), Second College Edition.

[10] "Advocate" means "to speak or write in support of: be in favor of." Webster's New World Dictionary (1986), Second College Edition.

[11] Of course, "proselytizing" that amounts only to a communication of belief should not be construed as action.

Against Black Gays, S. F. Chron., June 26, 1993, at A1, (App. A-35). That article contained a quotation from Reverend Lumpkin, identifying him not as a San Francisco Human Rights Commissioner, but as the pastor of Ebenezer Baptist Church. *Id.*

Ross McGowan conducted a live television interview of Reverend Lumpkin on the morning of August 20, 1993. The following are Mr. McGowan's exact questions, in their entirety, during the portion of the interview in which Reverend Lumpkin made the statements for which he was fired:

> "Do you believe . . . homosexuality is an abomination?"
> "Do you believe it?"
> "Do you believe?"
> "Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?"
> "Do you believe that?"
> "Do you believe that?"
> "Do you believe that?"

Interview, (App. A-45).

The questions clearly demonstrate that Reverend Lumpkin was being asked to clarify his personal religious beliefs. Reverend Lumpkin's answers to these questions merely reveal his belief that the Bible teaches that homosexuality is an abomination.[12] Significantly, Mayor Jordan had previously

---

[12] Interviewer: "Do you believe...homosexuality is an abomination?"
Reverend Lumpkin: "I believe--"
Interviewer: "Do you believe it?"

(continued...)

issued a press statement *supporting Reverend Lumpkin's right to hold this belief.*[13]

Further questions and responses clarified that Reverend Lumpkin believed that the Old Testament book of Leviticus stated that a man who sleeps with a man should be put to death,[14] and that he believed it was God who made that statement in Leviticus.[15] Reverend Lumpkin's final answer to the interviewer's last "Do you believe that?" indicates he believed that God's command of capital punishment for homosexual acts needed to be understood in its specific

---

[12](...continued)

Reverend Lumpkin:	"Sure. That--the Bible says it is.
Interviewer:	"Do you believe?"
Reverend Lumpkin:	"Sure, I believe. I believe everything the Bible sayeth. All I can understand, (Inaudible)."

Interview, (App. A-45).

[13] P.R. July 13, (App. A-40).

[14]

Interviewer:	"Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?"
Reverend Lumpkin:	"That's what it sayeth."

Interview, (App. A-45).

[15]

Interviewer:	"Do you believe that?"
Reverend Lumpkin:	"That's what God sayeth."

Interview, (App. A-45).

-historical setting.[16] Taken together, these statements could only have left the reasonable viewer with the impression that Lumpkin was merely answering questions in order to clarify his personal religious views on homosexuality.

Nor can the statements for which Lumpkin was terminated be reasonably classified as religious advocacy or action. Lumpkin never indicated that he believed the command in Leviticus should be practiced in modern society. Lumpkin never indicated that he believed in or advocated any type of punishment for homosexuals or homosexual acts, or that he would support or advocate any violence or aggression against homosexuals. He never indicated that attacks upon homosexuals could be justified by Scripture.

Mayor Jordan attempted to "spin" Reverend Lumpkin's television statements into something they were not. His press release of August 20, 1993 characterized Lumpkin's statements as "direct or indirect advocacy of violence,"[17] and stated that they implied "that stoning to death was the appropriate punishment for 'God's laws' as stated in the Book of Leviticus."[18] The Mayor's press release of August 23, 1993

---

[16] "Now, first of all, you have to understand the setting. God was at Mt. Sinai with the nation of Israel, who had just come out of bondage 430 years, and God was setting, giving the law on how he wanted them to conduct themselves in the new setting. And He says, 'Now, I don't want you acting as the way that they did in Egypt where we came from,' and He gave these laws, and said, this is a holy people following a holy God in fellowship, 'these are the things you need to refrain from.'" Interview, (App. A-45-46).

[17] P.R. Aug. 20, (App. A-51).

[18] *Id.*

further misrepresented Lumpkin's statements as implying "that stoning to death of homosexuals *was part of [Reverend Lumpkin's] biblical beliefs,*"[19] despite Mayor Jordan's knowledge to the contrary imparted to him personally by Lumpkin during a phone conversation earlier that day.

Mayor Jordan's office's reliance on Lumpkin's statements out of their proper context is a tactic specifically prohibited by this Court in *Rankin v. McPherson*: "A public employer may not divorce a statement made by an employee from its context . . . and use that statement standing alone as the basis for a discharge." 483 U.S. 378, 386, n.10 (1987). A review of the whole record below demonstrates that no reasonable viewer could have been left with the perception that Reverend Lumpkin believed in or promoted violence towards homosexuals.

Rankin also requires that Lumpkin's comments be taken in the context of his record as a Human Rights Commissioner. Mayor Jordan described Reverend Lumpkin's record as a Commissioner as follows:

> Reverend Lumpkin is and has always been a staunch defender of the principle of human and civil rights for everyone. He has a solid and unambiguous record as a member of the Human Rights Commission. *As a commissioner he has protected and advanced gay and lesbian civil rights.* . . . As a member of that Commission his *record on gay and lesbian issues is unblemished.* As a commissioner, he has served all segments of the San Francisco community with dignity and respect.

---

[19] P.R. Aug. 23, (App. A-53.) (emphasis added.)

P.R. July 13, (App. A-40) (Emphasis added).

Reverend Lumpkin's performance in upholding gay and lesbian civil rights was not incongruent with his religious beliefs. Although he did believe that the Bible condemned homosexual acts as morally wrong, Reverend Lumpkin was still strongly committed to the civil rights of those who practice such acts.[20]

Furthermore, both the District Court and the Court of Appeals erred by accepting the Mayor's characterization of the facts rather than drawing all inferences in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The District Court accepted Mayor Jordan's characterization of Lumpkin's comments as a "failure to renounce violence." *Lumpkin I*, (App. A-9). The District Court twice quoted the press releases that implied Lumpkin's comments justified violence. *Id.* at 5, 21, (App. A-4, A-14). The Court of Appeals quoted the August 23rd press release and uncritically accepted the press release's characterization that Lumpkin had condoned stoning homosexuals. *Lumpkin II*, 109 F.3d, at 1501, (App. A-22). The Court of Appeals said Lumpkin's statements "implicitly

---

[20] As Chief Justice Rehnquist noted in a similar context, the unconstitutional removal of jurors for religious views against the death penalty:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986).

endorsed violence against homosexuals." *Id.* at 1503, (App. A-24).

Where, as in this case, a government employee makes off-the-job public statements regarding his personal religious beliefs, and such statements do not amount to advocacy against his employer's interests, the Constitution does not permit the supposition that the employee's religious beliefs may interfere with the discharge of his public office. *See Torcaso v. Watkins,* 367 U.S. 488 (1961); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (Jury veniremen cannot be excluded for cause on the ground of religious scruples against the death penalty); *Lockhart v. McCree*, 476 U.S. 162 (1986). Unlike political beliefs, *e.g. Branti v. Finkel,* 445 U.S. 507 (1980), religious beliefs, by virtue of the Establishment Clause, are not ordinarily permitted to be factored into policymaking decisions. The religious beliefs of policymaking employees *per se* cannot be said to threaten the employer's interests. And where the employee's religious beliefs do not result in conduct detrimental to the employer's interests,[21] such beliefs are deemed irrelevant to the employer's affairs by virtue of the Free Exercise Clause.

III. THE DISTRICT COURT AND NINTH CIRCUIT MISAPPLIED THE *PICKERING* TEST IN RULING AGAINST LUMPKIN.

Assuming *arguendo,* the courts below were correct in applying the *Pickering* test to Lumpkin's termination, Lumpkin's right to profess his religious beliefs outweighed any asserted governmental interest in this case.

---

[21] *E.g. Baz v. Walters,* 782 F.2d 701 (7th Cir. 1986); *Shahar v. Bowers,* 114 F.3d 1097 (11th Cir. 1997).

Speech that constitutes profession of religious belief is accorded at least the protections given by the Free Speech Clause.[22] It also enjoys the heightened protection that is accorded religious expression under the Free Exercise Clause.[23] Speech constituting religious action presents a "hybrid situation" invoking both the right of free speech and the right of free exercise of religion. *Smith*, 494 U.S. at 882. Pursuant to *Smith*, the Mayor's conduct must be subjected to heightened scrutiny, and the government must demonstrate a "paramount interest" of "vital importance"[24] to overcome both Lumpkin's free speech and free exercise rights, such as an "incitement to imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).[25] No such threat to governmental functions or

---

[22] "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995).

[23] *See* Justice O'Connor's concurring opinion in *Smith*, 494 U.S. at 893 *et seq.*

[24] *Elrod*, 427 U.S. at 362; *Buckley v. Valeo*, 424 U.S. 1, 94 (1976); *NAACP v. Button*, 371 U.S. 45, 438 (1963); *NAACP v. Alabama*, 357 U.S. 449, 464-66 (1958).

[25] *Cf. Cantwell v. Connecticut*:

> No one would . . . suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that *a State may not unduly suppress free*

(continued...)

order appears in the record below.

In *Connick*, this Court set out the factors to be examined in a *Pickering* analysis and noted that the threshold inquiry is whether the employee's speech addressed a matter of public concern. *Connick*, 461 U.S. at 146. Religious belief is constitutionally always a matter of public concern.[26] Furthermore, the Court in *Connick* used the term "public concern" in contrast to a public employee's personal grievance toward his supervisor or employer. Lumpkin's remarks were not grievances towards the Mayor, the HRC, nor the CCSF.

Second, the Court in *Connick* mandated that a *Pickering* balance give "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 150. There was no evidence presented in the record that Lumpkin's beliefs had interfered with his public duties. On the contrary, the record shows that Lumpkin's record on gay and lesbian rights was "solid and unambiguous." P.R. July 13, (App. A-40).

The Ninth Circuit found that Lumpkin's statements were antithetical to the Commission's official charge" to eliminate prejudice and discrimination because of . . . sexual orientation

---

[25](...continued)
communication of views, religious or other, under the guise of conserving desirable conditions.

310 U.S. at 308 (emphasis supplied).

[26] *See* U.S. Const. Amend. I. "In short, speech on matters of public concern is that speech which lies 'at the heart of the First Amendment's protection.'" *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978).

. . . and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people."[27] In so doing, the appellate court relied upon a formulation of the government's asserted interest that is of questionable constitutionality in light of this Court's recent decision in *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992). The Court in *R.A.V.* struck down as facially invalid a municipal ordinance that had been construed to prohibit "fighting words" that insult or provoke violence on the basis of race, color, creed, religion or gender. *Id.* at 382. The Court held that while government may proscribe certain categories of speech, such as fighting words, it may not in so doing engage in content-based discrimination between points of view. *Id.* at 385-87.

> [T]he only interest distinctively served by [a] content limitation is that of displaying [the government's] special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.

Id. at 395. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S. Ct. 2338, 2351 (1995): "Disapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others." San Francisco therefore has no constitutionally cognizable state interest in "enforcing" the language of the HRC Charter.

The next factor for analysis set forth in *Connick* is whether the employee's speech interfered with working relationships. *Connick*, 461 U.S. at 151. Lumpkin's television statements were made on August 20, 1993. Mayor Jordan fired Lumpkin three days later on August 23, 1993. There was no meeting of

---

[27] *Lumpkin II*, 109 F.3d at 1504 (App. A-24).

the HRC to provide evidence of how other Human Rights Commissioners would react. Mayor Jordan did not seem concerned with relationships on the Commission after Lumpkin had been quoted in the newspaper as calling homosexuality "an abomination." Furthermore, the relationship between the Mayor and a Human Rights Commissioner is not the close working relationship described in *Connick*. Consequently, Lumpkin's relationships with others within the HRC and administration cannot be grounds for termination.

The Court in *Connick* was also concerned with whether the time, place and manner of the speech interfered with the employee's duties. *Id.* at 152-53. Lumpkin's television interview clearly did not conflict with his attendance at HRC meetings. Finally, the *Connick* Court inquired about the context in which the dispute arose to determine whether the speech resulted from an employment dispute. *Id.* at 153. Before the television interview Mayor Jordan was pleased with Lumpkin's performance as a Human Rights Commissioner.[28] There is no evidence in the record that Lumpkin had a grievance with the Mayor, the HRC or the CCSF. Clearly, none of the *Connick* factors may be found in the record below, and the District Court and the Ninth Circuit erred in finding that Lumpkin's termination was constitutionally justifiable.

The District Court and Ninth Circuit also erred by relying on the *Elrod* "policymaker" exception.[29] *Elrod* stands only for the proposition that Mayor Jordan would have been justified in firing the high level staff working in the Mayor's office who

---

[28] *See* P. R. July 13, (App. A-40).

[29] *See Lumpkin I*, (App. A-7-8, A-10); and *Lumpkin II*, 109 F.3d at 1509 (App. A-26).

had been hired by the previous administration.[30] The Mayor did not fire Lumpkin for his political views or political affiliation, but rather for expressing personal religious beliefs. The *Elrod* policymaker exception has not been applied by this Court to employee religious affiliation or belief, nor, for the reasons discussed above,[31] can such an application be constitutionally permitted. *Elrod* requires the employer (and the reviewing courts) to inquire "whether the hiring authority can demonstrate that *party affiliation* is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518 (emphasis added). To allow the Mayor to rely upon *Elrod* would be tantamount to holding that a particular religious belief or affiliation may be a bona fide occupational qualification, a view which is completely repulsive to the First Amendment. *Torcaso v. Watkins,* 367 U.S. 488 (1961); *McDaniel v. Paty,* 435 U.S. 618 (1978).

---

[30] *Elrod v. Burns,* 427 U.S. at 372-73 (dismissal of non-civil-service employees of the sheriff's office by a newly elected Sheriff because of the employees' political beliefs and associations held unconstitutional); *Branti v. Finkel,* 445 U.S. at 517 ("[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.")

[31] *See* discussion *supra*, at I (B) - (C).

CONCLUSION

Petitioner respectfully suggests that this case is of paramount importance because it is an example of the type of governmental action this Court cautioned against in *Rankin*:

> Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

483 U.S. at 384.

For the reasons set forth above, Petitioner prays that his Petition For A Writ of Certiorari be granted and that this Court decide the issues raised in the Petition.

Respectfully Submitted,

James D. Struck
THE STRUCK FIRM
Counsel of Record
1411 G Street
Modesto, California 95354
(209) 574-1440

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

DATED: August 12, 1997.

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TABLE OF CONTENTS

Order Granting Summary Judgment of the U.S. District Court for the Northern District of of California filed November 23, 1994, No. C-93-4338-FMS A-1

Judgment of the U.S. District Court for the Northern District of California filed November 22, 1994, No. C-93-4338-FMS A-16

Opinion of the U.S. Court of Appeals for the Ninth Circuit filed April 3, 1997, No. 95-15006 ..... A-17

Joint Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment filed in the U.S. District Court for the Northern District of California, October 28, 1994, No. C93-4338-FMS A-29

Civil Minute Order, Filed April 15, 1994 ..... A-33

San Francisco Chronicle, Evelyn C. White *History of Hostility: Bias From Within Against Black Gays* A-35

Mayor Jordan's Press Release, Dated July 13, 1993 ..... A-40

Channel 2 Interview of Reverend Eugene Lumpkin, Jr., August 20, 1993 ..... A-42

Declaration of Reverend Eugene Lumpkin, Jr. in Opposition to Motion for Summary Judgment filed in the U. S. District Court for the Northern District of California, October 7, 1994, No. C93-4338 FMS A-47

Mayor Jordan's Press Release, Dated August 20, 1993 ..... A-51

Mayor Jordan's Press Release, Dated August 23, 1997 ..... A-53

Board of Supervisors Resolution, Supervisor Hallinan, Dated June 19, 1993 ..... A-55

Levitical Beliefs of Eugene Lumpkin A-58

Constitutional and Statutory Provisions A-61

United States Constitution, Article VI, Clause 4 ..... A-61

United States Constitution, Amendment I A-61

United States Constitution, Amendment XIV, Section 1 ..... A-61

42 U.S.C. § 1983 ..... A-62

California Constitution, Article 1, §§ 4 and 8 ..... A-63

California Gov't Code,
Article 1, 12940(a) A-64

California Gov't Code, 12926(c) A-65

San Francisco Administrative Code
Chapter 12A Human Rights Commission
§§ 12A.1 - 12A.4 ..... A-66

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EUGENE LUMPKIN, JR.,	
	No. C-93-4338 FMS
Plaintiff,	
	ORDER GRANTING
vs.	**SUMMARY**
	JUDGMENT
FRANK JORDAN, Mayor of the City and County of San Francisco, et al.,	
Defendants.	

Introduction

These motions concern the alleged unlawful removal of plaintiff Reverend Eugene Lumpkin, Jr. ("plaintiff" or "Reverend Lumpkin") by defendant Mayor Frank Jordan ("defendant" or "Mayor Jordan") from the San Francisco Human Rights Commission ("the Commission"). After his removal from the Commission, Reverend Lumpkin sued Mayor Jordan and the City and County of San Francisco ("defendants"). The complaint alleges two causes of action, the first of which is brought pursuant to Cal. Gov't. Code §12940, the California Fair Employment and Housing Act ("FEHA"). The second cause of action, brought pursuant to 42 U.S.C. § 1983, claims violations of the freedom of speech, the Free Exercise Clause, and the Establishment Clause of the First and Fourteenth Amendments. Plaintiff also alleges similar violations of his rights under Article I, §§ 4 and 8 of the

California Constitution. Plaintiff requests the following relief: 1. a judicial declaration that his civil rights were violated; 2. to be reinstated as Commissioner; 3. compensatory damages as to the City; and 4. attorneys' fees pursuant to 42 U.S.C. § 1988.

Defendants move for summary judgment as to all of plaintiff's claims. In his opposition to defendants' motion for summary judgment ("Opposition"), plaintiff asks the Court to grant summary judgment sua sponte in his favor. In the alternative, plaintiff asks the Court to grant a continuance and allow plaintiff the opportunity to depose Mayor Jordan pursuant to Rule 56(f) of the Federal Rules of Civil Procedure.[32]

Background

On August 13, 1992, defendant Jordan, Mayor of the City and County of San Francisco, appointed Reverend Eugene Lumpkin to serve as a member of the San Francisco Human Rights Commission. Joint Statement of Undisputed Facts, ¶ 1 ("Joint Statement"). At the time of his appointment, plaintiff was a Baptist minister who served as Pastor of the Ebenezer Baptist Church in San Francisco. Mayor Jordan and plaintiff have known one another for over fifteen years, and, at the time of the appointment, Mayor Jordan was aware that plaintiff was a Baptist minister. Id.

On June 26, 1993, The San Francisco Chronicle quoted Reverend Lumpkin as saying: "It's sad that people have AIDS and what have you, but it says right there in the scripture that

---

[32] Rule 56(f) provides that a Court may order a continuance on a motion for summary judgment to permit the party opposing the motion to conduct additional discovery.

the homosexual lifestyle is an abomination against God. So I have to preach that homosexuality is a sin." Joint Statement, ¶ 5 and Defendants' Exhibit B, filed with the Court on August 8, 1994. These remarks provoked a public controversy surrounding plaintiff's membership on the Commission. Declaration of Noah Griffin in Support of Defendants' Motion for Summary Judgment, ¶¶ 3, 4 ("Noal Decl.").

On July 13, 1994, after meeting with plaintiff, Mayor Jordan issued a press release announcing that he would not remove Reverend Lumpkin from the Commission. In this statement, Mayor Jordan state that Reverend Lumpkin "has a solid and unambiguous record as a member of the Human Rights Commission. As a commissioner he has protected and advanced gay and lesbian civil rights." Defendants' Exhibit C, filed with the Court on August 8, 1994.

In reaction to the Mayor's announcement, the San Francisco Board of Supervisors adopted a resolution on July 19, 1993 calling for plaintiff's resignation or removal from the Commission. Exhibit C, filed with Defendants' Request for Judicial Notice. The resolution demanded that Mayor Jordan "restore public confidence in the role and mission of the Commission, especially with regards to the ability of the Commission to consider complaints and lead the community toward equality and respect for all lesbian and gay San Franciscans." Id.

On August 20, 1993, Reverend Lumpkin was interviewed during a live broadcast of a San Francisco television news show, Mornings on 2. After the interviewer identified Reverend Lumpkin as a member of the Commission, he asked plaintiff if he believed homosexuality to be an "abomination." The Reverend replied, "Sure, I believe, I believe everything the Bible sayeth." The following exchange ensued:

Interviewer: Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?

Reverend Lumpkin: That's what it sayeth.

Interviewer: Do you believe that?

Reverend Lumpkin: That's -- I said that's what the Book sayeth.

Interviewer: Do you believe that?

After some silence, Reverend Lumpkin stated that God delivered this pronouncement to the nation of Israel after it came out of bondage of Egypt. Joint statement, ¶ 7, Defendants' Exhibit E, filed with the Court on August 8, 1994.

Later that day, after learning of the interview, Mayor Jordan asked Reverend Lumpkin to resign from the Commission. In a press release explaining his decision, Mayor Jordan stated:

> While religious beliefs are constitutionally protected and cannot be the grounds to remove anyone from elected or appointed public office, the direct or indirect advocacy of violence is not, cannot and will not be condoned by this administration . . . On the grounds of religious freedom and an unblemished record as a Human Rights Commissioner, I have supported Reverend Lumpkin for holding fundamentalist beliefs which are not my own. We part company when those beliefs imply that attacks against anyone can be justified by the scripture or on any other grounds.

Joint statement, ¶ 8, Defendants' Exhibit F, filed with the

Court on August 8, 1994.

On August 23, 1993, Mayor Jordan met with Reverend Lumpkin, who refused to resign. After this meeting, Mayor Jordan announced his decision to remove Reverend Lumpkin from the Commission. Joint Statement, ¶¶ 9-10.

Discussion

A. Standard for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Recognizing that summary judgment motions can contribute significantly to the resolution of litigation when there are no factual issues, the Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), quoting Fed. R. Civ. P. 56(e) (emphasis added), and citing Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986)); and

Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. T.W. Elec. Serv., 809 F.2d at 630-31, citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Rule 56(c), nevertheless, requires this Court to enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient: there must be evidence on which the jury could reasonably find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

B. The Free Speech Claim

The Supreme Court has recognized that the government's interests, when acting as an employer and not as a sovereign, in regulating the speech of its employees differs "significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The Supreme Court has thus sought a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id.

Subsequently, in Elrod v. Burns, 427 U.S. 347 (1978), the Supreme Court created an exception to the general rule that public employees cannot be disciplined solely for exercising

their First Amendment rights. While holding unconstitutional the dismissal of nonpolicy-making, nonconfidential government employees solely because of their political affiliation, the Supreme Court found that the State could dismiss policymakers solely because of their political affiliation. Id. at 367. The Court reasoned that "limiting patronage dismissals to policymaking positions" is sufficient to achieve the governmental end that "representative government not be undercut by tactics obstructing the implementation of policies." Id.

Plaintiff argues that the Elrod "policymaking" exception, which allows the government to dismiss an employee for exercising his or her First Amendment rights, should be limited to political affiliation and patronage cases. This exception has been applied in non-political contexts, however, and the Court applies it here. See Besig v. Friend, 460 F. Supp. 134 (N.D. Cal. 1978) (member of the Recreation and Park Commission found to be policymaker, and thus could be dismissed by Mayor for joining in a controversial legal action.); Hall v. Ford, 856 F.2d 255, 265 (D.C. Cir. 1988) (athletic director found to be a "policy level employee" and thus could be dismissed for "expressing views on matters within the core of his responsibilities that reflected a policy disagreement with his superiors.").

Finding that the "policymaking" exception applies, the next question is whether Reverend Lumpkin was in fact a high-level employee.[33] Elrod also provides guidance as to when an

---

[33] Defendants correctly point out that although plaintiff was a political appointee, consistent with Ninth Circuit precedent, this case is treated as one involving the speech of an employee. See Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992), cert. denied, Wonder v. Hyland, 1993 U.S.

(continued...)

employee is to be considered a policymaker:

> The nature of the responsibilities is critical . . . An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position . . . [C]onsideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Elrod, 427 U.S. at 368.

The Court, applying these guidelines, concludes that Reverend Lumpkin, as a Commissioner of the San Francisco Human Rights Commission, was a policymaker. Plaintiff had broad responsibilities for formulating, implementing and explaining policy. The Commission has the power to "prescribe reasonable rules and regulations" for the conduct of its department's affairs, officers and employees. S.F. Admin. Code § 3.500(a). As the Besig court stated, "[h]ow the Commission exercises these management responsibilities are necessarily questions of policy. Accordingly, the individual Commissioners are policymakers." Besig, 460 F. Supp. at 139.

The Human Rights Commission is charged with eliminating prejudice and discrimination; with advising City agencies on how to keep peace; and with encouraging private persons to "promote and provide equal opportunity for and good will toward all people." S.F. Admin. Code § 12A.2. Reverend Lumpkin's televised remarks regarding homosexuality could reasonably have been interpreted by the Mayor as undermining the very policies of the Commission: to

---

[33](...continued)
Lexis 3229 (1993) (volunteer treated as employee for speech claim).

promote good will toward all people.[34] Reverend Lumpkin's failure to renounce violence against this group was "highly disruptive to the operations of the City and the agency he served." Defendants' Reply Brief in Support of Motion for Summary Judgment, p. 6 ("Reply"). Indeed, in light of the public uproar surrounding plaintiff's comments, the Mayor could reasonably have concluded that members of San Francisco's gay and lesbian community "would be loathe to discuss their disputes and grievances with" the Commission after one of its members not only publicly condemned homosexuality but failed to renounce violence against members of that community. Sims v. Metropolitan Dade County, 972 F.2d 1230, 1238 (11th Cir. 1992).

Contrary to his contention, plaintiff could not have been dismissed for anything he said. If, for example, he were removed as Commissioner after proclaiming that he believed the world has been created in seven days, this would be a very different case; such a statement presumably would not have thwarted the policies of the Commission and of the Mayor. It would have also been a different case if Reverend Lumpkin had expressed his views regarding homosexuality while serving on the Public Utilities Commission, for example, rather than the Human Rights Commission; his statements might not then, as they did in this case, have undermined the policies of the entity he served. Absent the requisite nexus between the policymaker's speech and disruption to or thwarting of the policies of the entity he or she serves, a policymaker cannot be

---

[34] As stated by the Supreme Court recently in Waters v. Churchill, 114 S.Ct. 1878, 1889 (1994), the Court must "look to the facts as the employer reasonably found them to be." Thus, plaintiff's argument that Mayor Jordan interpreted his comments too literally is unpersuasive; the Court is only concerned with how the Mayor reasonably interpreted plaintiff's remarks at the time they were aired.

removed for exercising his or her constitutional right to free speech. Because plaintiff was a policymaker, however, and because the requisite nexus existed, his removal did not violate the free speech clause of the First Amendment.

C. The Free Exercise of Religion Claim

As in the context of free speech, the government, as an employer, is given greater latitude in regulating the religious expression of its employees. See Baz v. Walters, 782 F.2d 701 (7th Cir. 1986); Shahar v. Bowers, 836 F. Supp. 859 (N.D. Ga. 1993). The Supreme Court has held that when a public employer infringes upon a constitutionally-protected right, the constitutionality of the employer's action turns upon the balancing between the employee's asserted interest and the employer's interest in the efficient operations of the government. Pickering v. Board of Education, 391 U.S. 563, 568 (1968).[35] Pickering specifically involved a free speech claim; however, it has been applied in other contexts and is applicable here. See Baz, 782 F.2d 701.

In Rankin v. McPherson, 483 U.S. 378 (1987), the Supreme Court explained how the Pickering test is to be applied:

> In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the speech arose . . . We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or

---

[35] The Court did not utilize the Pickering balancing test in its analysis of the free speech claim because it found the Elrod "policymaking" exception to apply.

> harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

Id. at 388 (citations omitted). The Court went on to explain that in weighing the State's interest in discharging an employee based on the claim that the employee's statement undermined the mission of the employer,

> some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.

Id. at 390.

While Rankin and Pickering both involved free speech claims, the 7th Circuit in Baz v. Walters, 782 F.2d 701 (1986), applied the Pickering test in a free exercise claim. In Baz, plaintiff, a chaplain, who worked in a Veterans Administration psychiatric hospital, was fired because his attempts to preach to the patients were "antithetical" to the policies of the V.A. The chaplain challenged his termination under the Free Exercise Clause. The Court, employing the Pickering balancing test, found that "the V.A. was justified in limiting Reverend Baz's religious expression" because his religious activities "were detrimental to the best interests of the patients and to the general maintenance of order at the hospital." Id. at 709. As such, there had been no violation of the Free Exercise Clause. See also Smith v. United States, 502 F.2d 512 (5th Cir. 1974) (government justified in terminating V.A. staff psychologist who insisted in wearing peace pin in violation of

V.A. regulation when his actions constituted a "material and substantial interference" with his therapeutic duties).

Applying the Pickering test to the present case, the Court finds that Mayor Jordan's interest in preventing disruption to the goals of his Administration outweighs Reverend's Lumpkin's right to religious expression. Based on the Rankin factors, it is significant that Reverend Lumpkin was a high-level policymaker who appeared on live television to express viewpoints which were reasonably construed as being at odds with the goals of the Commission. His statements had a noticeable and "detrimental impact" on the public's perception of the Commission and "interfere[d] with the regular operation" of the Jordan Administration. Rankin, 483 U.S. at 388. Mayor Jordan was therefore justified in removing plaintiff from the Commission.

Critical to this analysis is the fact that Reverend Lumpkin was not removed solely for exercising his constitutional rights. He is, and at all times was, free to hold and to profess his religious beliefs; however, when the expression of those beliefs clashed with the goals of the Jordan Administration and undermined the public confidence in the ability of the Commission to effect its goals, the Mayor was justified in removing him. The Court finds that plaintiff's removal did not violate the Free Exercise Clause.

D. The Establishment Clause Claim

Governmental actions challenged under the Establishment Clause are evaluated under the three-part test enunciated by the

Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971).[36] "In order to pass constitutional muster, the challenged action must (1) have a secular purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. Vernon v. City of Los Angeles, 27 F.3d 1385, 1396 (9th Cir. 1994), quoting Lemon v. Kurtzman 403 U.S at 612-13.

Defendants correctly contend that the first and third prongs of the Lemon test are not at issue here. The "secular" prong is satisfied as the Mayor removed Reverend Lumpkin to quell a public controversy and to secure a commissioner who would implement his policies. Similarly, the "entanglement" prong is satisfied in that the Mayor's action did not entail a "comprehensive, discriminating, and continuing state surveillance of religion" so as to constitute excessive entanglement. Vernon, 27 F.3d at 1399.

Under the "primary effect" prong, the Court "must consider whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion. Id. at 1398 (emphasis added). Plaintiff claims that his removal from the Commission for "expressing his religious belief concerning the inerrancy of scripture is clearly hostile to that belief, and therefore tends to promote beliefs that are less literal concerning scripture." Opposition, p. 14.

---

[36] Under Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994), the Lemon test is used to evaluate establishment claims arising under both the federal and state constitutions. Because they can be analyzed simultaneously, the Court finds that plaintiff's establishment claims under both the federal and California Constitutions fail to survive summary judgment.

Plaintiff fails to realize that he was not removed because he believed in the inerrancy of the Bible; rather, he was removed because his religious beliefs were at odds with the goals of the Commission and disrupted Mayor Jordan's administration. Mayor Jordan's actions did not have the primary effect of disapproving of plaintiff's religious beliefs; in fact, the Mayor in his August 20, 1993 press release stated: "I have supported Reverend Lumpkin for holding fundamentalist beliefs which are not my own." Defendants' Exhibit F, filed with the Court on August 8, 1994. In addition, the Mayor's August 23, 1993 press release announcing his decision to remove Lumpkin made it clear that his removal was based on secular concerns:

> I have not . . . ask[ed] that a religious litmus test of beliefs be a part of the appointment process for any San Francisco Commission . . . But when those beliefs are volunteered in a way that negatively influences the operation of a state function, or suggest a justification for actions which may lead to violence, I believe it crosses the line between church and state.

Mayor Jordan at all times showed respect for plaintiff's religious beliefs. The Court therefore finds that the government's actions could not "reasonably be construed to send as its primary message the disapproval" of Reverend Lumpkin's religious beliefs. Vernon, 27 F.3d at 1399 (emphasis in original). The government's action satisfies the second prong of the Lemon test; therefore, plaintiff's dismissal did not violate the establishment provisions of the federal or state constitution.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is GRANTED. Except for the state establishment

claim, the Court declines to exercise supplemental jurisdiction over the remaining state law claims, which are dismissed without prejudice. 28 U.S.C. §1367(c(3). In accordance with this ruling, plaintiff's request to depose Mayor Jordan under Rule 56(f) is DENIED. The Clerk of the Court shall close the file.

SO ORDERED.

DATED: November 22, 1994

By: (Signature)
FERN M. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EUGENE LUMPKIN, JR.,	
	No. C-93-4338 FMS
Plaintiff,	
vs.	**JUDGMENT**
FRANK JORDAN, Mayor of the City and County of San Francisco, et al.,	
Defendants.	

For the reasons stated in the accompanying Order, judgment is hereby entered in favor of defendant Frank Jordan, et al. and against plaintiff Eugene Lumpkin, Jr. The Clerk of the Court shall close the file.

SO ORDERED.

DATED: November 22, 1994

(Unsigned)
FERN M. SMITH
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Reverend Eugene Lumpkin, Jr.	
	No. 95-15006
Plaintiff-Appellant,	
	D.C. No.
v.	CV-93-04338-FMS
Willie L. Brown, Jr., Mayor of the City and County of San Francisco* and City and County of San Francisco,	**OPINION**
Defendants-Appellees.	

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
April 8, 1996 -- San Francisco, California

Filed April 3, 1997

Before: William A. Norris and Charles Wiggins,
Circuit Judges, and Howard D. McKibben,**
District Judge.

Opinion by Judge Norris

---

* Willie L. Brown is substituted for his predecessor, Frank Jordan, as Mayor of the City and County of San Francisco. F.R.A.P. 43(c)(1).

** Honorable Howard D. McKibben, District Judge from the District of Nevada, sitting by designation.

SUMMARY

Labor and Employment / Government Employment

The court of appeals affirmed a judgment of the district court. The court held that a city's firing of a human rights commissioner who advocates violence against homosexuals does not violate the First Amendment or Religious Freedom Restoration Act (RFRA).

During his tenure as a member of appellee City and County of San Francisco's Human Rights Commission, appellant Reverend Eugene Lumpkin, Jr. made statements in media interviews condemning homosexuality and quoting Bible passages prescribing death for practicing homosexuals. Mayor Jordan fired Lumpkin, citing the antithesis between Lumpkin's public statements and his role as a member of the Human Rights Commission.

Lumpkin sued, alleging claims under the First Amendment and the RFRA. The district court granted summary judgment for the defendants, ruling that the City's action was justifiable because Lumpkin's statements were inconsistent with his responsibilities as a commissioner to formulate, implement, and explain the policy of the Human Rights Commission. Lumpkin appealed.

[1] Neither the First Amendment nor the RFRA required San Francisco to tolerate members of the Human Rights Commission who made public statements that were antithetical to the Commission's charge to eliminate prejudice and discrimination, and to encourage private persons and groups to promote and provide equal opportunity for and good will toward all people. Lumpkin's statements condemning

homosexuality as a sin and implicitly endorsing violence against homosexuals were not simply hostile to the Commission's charge, they were at war with it.

[2] Lumpkin had every right to preach that homosexuality is a sin and that "a man who sleeps with a man should be put to death," but the First Amendment did not assure him job security when he preached homophobia while serving as a City official. [3] When the government acts as an employer, it has certain latitude to protect its operations and policies from being subverted by its own personnel. Lumpkin's First Amendment rights could be trumped by important interests of the city he agreed to serve.

[4] In resolving conflicts between the First Amendment rights of public officials and the interests of government, courts engage in a balancing test. When weighing the City's interest in eliminating prejudice and discrimination against Lumpkin's First Amendment interest in condemning homosexuality as a sin while serving as a member of the Human Rights Commission, the conclusion was inescapable that the City's interests prevailed.

[5] The City had not only a legitimate, but a heightened expectation that its Human Rights Commissioners would refrain from speaking publicly in a way that mocked the City's antidiscrimination policy. Government employees who occupy policymaking positions may be removed even on the basis of political affiliation because of the need for loyalty, to the end that government not be undercut by tactics obstructing the implementation of administration policies.

[6] The RFRA did not mandate a different result. The City's removal of Lumpkin from its Human Rights Commission served a compelling governmental interest -- the

preservation of the integrity of its antidiscrimination policies. It was also the only effective way to remedy the damage his statements wreaked on the credibility of those policies.

[7] Mayor Jordan consistently acknowledged Lumpkin's right to adhere to his religious faith and stressed the secular reasons for his removal. Because the Mayor's statements adhered to secular principles, they defeated Lumpkin's claim that his removal had the impermissible primary effect of promoting any particular religious faith.

COUNSEL

James D. Struck, The Rutherford Institute, Modesto, California, for the plaintiff-appellant.

Dennis Aftergut, Deputy City Attorney, San Francisco, California, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

In 1993, the City of San Francisco removed Reverend Eugene Lumpkin from his position as a member of the San Francisco Human Rights Commission because of public statements he made condemning homosexuality. The statements cited by the City in removing Reverend Lumpkin included the following:

* "[T]he homosexual lifestyle is an abomination against

God. So I have to preach that homosexuality is a sin." CR 29, exh. B.

* "I believe everything the Bible sayeth," which includes belief in the proscription in Leviticus that a man who sleeps with a man should be put to death. CR 29, exh. E.[1]

---

[1] Following his first public statement condemning homosexuality as a sin, Reverend Lumpkin was interviewed on a San Francisco television news program, *Mornings on 2*. The following exchange occurred:

Interviewer:	Do you believe homosexuality is an abomination?
Lumpkin:	I believe ---
Interviewer:	Do you believe it?
Lumpkin:	Sure. That -- the Bible say [sic] it is.
Interviewer:	Do you believe?
Lumpkin:	Sure, I believe. I believe everything the Bible sayeth. All I can understand (inaudible).
Interviewer:	Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?
Lumpkin:	That's what it sayeth.
Interviewer:	Do you believe that?
Lumpkin:	That's what God sayeth.
Interviewer:	Do you believe that?
Lumpkin:	That's -- I said that's what the Book sayeth.

(continued...)

In removing Reverend Lumpkin from office, then-Mayor Frank Jordan stated:

> Reverend Lumpkin chose to make his beliefs a part of the political process, and in so doing crossed the line from belief to behavior to advocacy. Reverend Lumpkin, by failing to disassociate himself from specific biblical passages which may appear to justify stoning persons or groups of people, implied that he condoned physical harm.
>
> . . . [N]o person will be allowed to serve in my administration whose actions may be interpreted by some to encourage violence or give support to others who seek to justify their hatred.

CR 29, exh. H.

---

[1](...continued)

Interviewer:	Do you believe that?
Lumpkin:	Now, first of all, you have to understand the setting. God was at Mt. Sinai with the nation of Israel, who had just come out of bondage 430 years, and God was setting, giving the law on how he wanted them to conduct themselves in the new setting. And he says, "Now, I don't want you acting as the way they did in Egypt where we came from," and He gave these laws, and said, this is a holy people following a holy God in fellowship, "these are the things you need to refrain from."

CR 29, exh. E, at 4-6.

Mayor Jordan's action was backed by the San Francisco Board of Supervisors, which resolved that:

> Eugene Lumpkin has, by his words and demeanor undermined the role and responsibilities of the Human Rights Commission and his statements and actions have resulted in a lack of confidence in the Commission's ability to perform its duties as expressed by a wide range of San Francisco residents and organizations . . .

CR 23, Exh. C at 2.

Reverend Lumpkin sued the Mayor and the City, claiming that his removal from the Human Rights Commission violated his rights under the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1. The district court granted defendants summary judgment on the ground that the City's action was fully justified because Reverend Lumpkin's public statements were inconsistent with his "broad responsibilities for formulating, implementing and explaining [the] policy" of the Human Rights Commission, Order at 9, 14, and because his dismissal did not constitute governmental establishment of religion. Order at 17.

[1] We agree with the district court that neither the First Amendment nor the Religious Freedom Restoration Act requires San Francisco to tolerate members of its Human Rights Commission who make public statements that are antithetical to the Commission's official charge "to eliminate prejudice and discrimination because of race, religion, color, ancestry, age, sex, sexual orientation, disability, or place of birth . . . and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people." San Francisco Admin. Code § 12A.2.

Reverend Lumpkin's statements explicitly condemning homosexuality as a sin and implicitly endorsing violence against homosexuals are not simply hostile to the Commission's charge, they are at war with it. Neither the First Amendment nor the Religious Freedom Restoration Act requires government at any level to put up with policy-level officials who work at cross-purposes with the policies they are responsible for carrying out.

[2] To be sure, when Reverend Lumpkin speaks as a private citizen, he has every right to preach that homosexuality is a sin and that Leviticus says that "a man who sleeps with a man should be put to death." CR 29, exh. E, at 5. But the First Amendment does not assure him job security when he preaches homophobia while serving as a City official charged with the responsibility of "eliminat[ing] prejudice and discrimination." When he took his oath of office, he entered into a covenant with the people of San Francisco that he would work to further the policies he was empowered to carry out. He accepted a position of public trust which obligated him to foster tolerance, not intolerance. Predictably, the people of San Francisco reacted with a sense of outrage to his public statements. CR 26, at 3. As Reverend Lumpkin himself put it, "Mayor Jordan has been besieged with demands that he fire me from the City's Human Rights Commission. " CR 23, exh. A., at 1.

[3] The First Amendment strictly protects freedom of expression. Nonetheless, when the government acts as an employer, it has certain latitude to protect its operations and policies from being subverted by its own personnel. *See Waters v. Churchill*, 114 S. Ct. 1878, 1888 (1994) (plurality opinion) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as an employer."). That is not to

say that Reverend Lumpkin left his First Amendment rights at the door of City Hall when he took office as a Human Rights Commissioner. It is to say, however, that his First Amendment rights may be trumped by important interests of the City he agreed to serve.

[4] In resolving conflicts between the First Amendment rights of public officials and the interests of government, courts engage in a balancing test. *See Pickering v. Board of Education,* 391 U.S. 563, 568 (1968) ("the interests of the [employee], as a citizen, in commenting upon matters of public concern" are weighed against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); *Tucker v. State of California Dep't of Education,* 97 F.3d 1204, 1210 (9th Cir. 1996) (applying *Pickering* balancing test in reviewing First Amendment challenge to restrictions on a public employee's expression of his religious views); *Brown v. Polk County,* 61 F.3d 650, 658 (8th Cir. 1995) (en banc) ("[*Pickering*] dealt with free speech rather than the free exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of *Pickering* to the case at hand."). When we apply *Pickering* and weigh the City's interest in eliminating prejudice and discrimination against Reverend Lumpkin's First Amendment interest in condemning homosexuality as a sin while serving as a voting member of the Human Rights Commission, the conclusion is inescapable that the City's interests prevail. As a private citizen, Reverend Lumpkin is perfectly free to preach vigorously and robustly that homosexuality is a sin. But he did not enjoy that same unrestrained freedom while he occupied the important and prestigious office of a Human Rights Commissioner.

[5] Because the Human Rights Commission, as the District

Court put it, "formulat[es], implement[s] and explain[s]" the City's antidiscrimination policies, Order at 9, the City has not only a legitimate, but a heightened expectation that its Human Rights Commissioners refrain from speaking publicly in a way that mocks the City's antidiscrimination policy. *Compare Rankin v. McPherson*, 483 U.S. 378, 390 (1987) ("The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.") *with Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989) (governmental interest is not furthered by discharge of nonpolicymaking employees who are not in positions to thwart governmental goals). Government employees who occupy policymaking positions may even be removed solely on the basis of political affiliation, whether or not the employees make public statements, because of "the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration . . . ." *Elrod v. Burns*, 427 U.S. 347, 367 (1978).

The very fact that Reverend Lumpkin was a Human Rights Commissioner made it predictable that his public condemnation of homosexuality would be much more newsworthy than if he had been speaking solely as a private citizen. So it is not surprising that he attracted the attention of the media and, in turn, ignited a public outcry. Applying the *Pickering* balancing test, we hold that the City's interest in having commissioners who work to promote City policies far outweighs any commissioner's First Amendment interest in publicly expressing views that subvert those policies.

[6] The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1, does not mandate a different result. According to RFRA, "[g]overnment shall not

substantially burden a person's exercise of religion" unless the burden is "(1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a),(b). The City's removal of Reverend Lumpkin from its Human Rights Commission served a compelling governmental interest -- the preservation of the integrity of its antidiscrimination policies. It was also the only effective way to remedy the damage his statements as a Commissioner wreaked on the credibility of those policies. Accordingly, we reject Reverend Lumpkin's RFRA claim.

[7] We turn finally to Reverend Lumpkin's claim that his removal from the Human Rights Commission violated the Establishment Clause by endorsing a particular religious faith that interprets scripture "less literal[ly]" than does Reverend Lumpkin's. Appellant's Opening Br. at 30. Reverend Lumpkin's only argument is that the City promoted a religious faith that is antithetical to Reverend Lumpkin's. But Mayor Jordan's press releases consistently acknowledged Reverend Lumpkin's right to adhere to his religious faiths and stressed the secular reasons for Reverend Lumpkin's removal. When the Mayor announced Reverend Lumpkin's removal from the Human Rights Commission, he stated that "I have not in the past, nor will I in the future ask that a religious litmus test of beliefs be a part of the appointment process for any San Francisco Commission." CR 29, Exh. F. The Mayor went on to say that "when [religious] beliefs are volunteered in a way that negatively influences the operation of a state function, or suggests a justification for actions which may lead to violence, I believe it crosses the line between church and state." *Id.* Because these statements adhere to secular principles, they defeat Reverend Lumpkin's claim that his removal from the Human Rights Commission had the impermissible primary effect of promoting any particular religious faith. *See Vernon*

v. City of Los Angeles, 27 F.3d 1385, 1398-99 (9th Cir. 1994) ("Notwithstanding the fact that one may infer possible city disapproval of Vernon's religious beliefs from the direction of the investigation, this cannot objectively be construed as the primary focus or effect of the investigation."). We therefore reject Reverend Lumpkin's Establishment Clause claim.

Conclusion

We AFFIRM the summary judgment in favor of defendants. Accordingly, we deny Reverend Lumpkin's request for attorney's fees because he is not here a prevailing party. 28 U.S.C. § 1988.

LOUISE H. RENNE
City Attorney
JONATHAN HOLTMAN NO: 99795
JULIA M. C. FRIEDLANDER NO: 165767
Deputy City Attorneys
MARTIN KASSMAN NO: 136326
Of Counsel
City Hall, Room 206
San Francisco, CA 94102-4682
(415) 554-4255

Attorneys for Defendants, FRANK JORDAN, Mayor of the City and County of San Francisco and City and County of San Francisco

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EUGENE LUMPKIN, JR.,	Case No: C93-4338 FMS
Plaintiff,	**Joint Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment**
- vs -	
FRANK JORDAN, Mayor of the City and County of San Francisco, et al.,	Date: 10/28/94
Defendants.	Time: 10:00 a.m.
	Crtrm: 15
	Judge Fern M. Smith

IT IS HEREBY stipulated by and between Plaintiff and Defendants, by and through their respective attorneys of record, as follows:

1. On August 13, 1992, Frank Jordan, Mayor of City and County of San Francisco, appointed Eugene Lumpkin to serve as a member of San Francisco Human Rights Commission. See true and correct copy of Certificate of Appointment of Officer previously filed and lodged with the Court on August 8, 1994 as Exhibit A.

2. Pursuant to the San Francisco Charter, members of the Human Rights Commission receive compensation at the rate of $50 per Commission meeting, not to exceed two meetings or $100 per month.

3. At the time of Lumpkin's appointment to the Human Rights Commission, the Mayor had known Lumpkin for approximately fifteen to twenty years.

4. At the time of Lumpkin's appointment, the Mayor was aware that his appointee was a Baptist minister who served as Pastor of the Ebenezer Baptist Church in San Francisco.

5. In June 1993, Lumpkin was interviewed for publication by a San Francisco Chronicle reporter, Evelyn White. Ms. White authored an article entitled "Bias From Within Against Black Gays" which was published in the San Francisco Chronicle on June 26, 1993, and attributed certain remarks to Reverend Lumpkin. See true and correct copy of article, previously filed and lodged with the Court on August 8, 1994 as Exhibit B. The Mayor met personally with Reverend Lumpkin after publication of this article.

6. The Mayor issued a press statement announcing his decision that he would not remove Lumpkin from the Human Rights Commission. As a commissioner he has protected and advanced gay and lesbian civil rights." This statement

accurately reflected the Mayor's beliefs and actions regarding Reverend Lumpkin's tenure on the Human Rights Commission as of that date. See true and correct copy of Mayor's July 13, 1993 press statement, previously filed and lodged with the Court on August 8, 1994 as Exhibit C.

7. On August 20, 1993, Lumpkin was interviewed during a live broadcast on a San Francisco television news show, "Mornings On 2." See true and correct videotape of interview, previously filed and lodged with the Court on August 8, 1994 as Exhibit D and true and correct copy of interview transcript, previously filed and lodged with the Court on August 8, 1994 as Exhibit E.

8. On August 20, Mayor Jordan requested Reverend Lumpkin's resignation from the Human Rights Commission by telephone and announced his request by press statement. See true and correct copy of August 20 press statement, previously filed and lodged with the Court on August 8, 1994 as Exhibit F.

9. On August 23, Mayor Jordan met with Reverend Lumpkin. Reverend Lumpkin did not resign.

10. On August 23, 1993, Mayor Jordan removed Reverend Lumpkin from the Human Rights Commission and announced his decision to remove Lumpkin by press statement. See true and correct copy of removal notice previously filed and lodged with the Court on August 8, 1994 as Exhibit G and true and correct copy of August 23 press statement previously filed and lodged with the Court on August 8, 1994 as Exhibit H.

DATED: 9/22/94

Respectfully submitted,

LOUISE H. RENNE
City Attorney
JONATHAN HOLTMAN
Deputy City Attorney

By: _____(Signature)_____
JULIA M. C. FRIEDLANDER
Deputy City Attorney

Attorneys for Defendants

DATED: 9/20/94

THE RUTHERFORD INSTITUTE

By: _____(Signature)_____
JAMES D. STRUCK

Attorneys for Plaintiff

CIVIL MINUTE ORDER
Filed April 15, 1994

Date: 4/15/94 At: 8:30 a.m.

JUDGE FERN M. SMITH, Courtroom 9 - 19th Floor
Case No.: C-93-4338-FMS
Clerk: Laura Giangarra
Reporter: None
Tape:

Eugene Lumpkin v. Mayor Jordan

Attorneys:

Pltff: James Struck
(209) 578-0165

Deft: Asst. City Atty. - Arthur Greenberg
(415) 554-4285

PROCEEDINGS:

S/C held. Joint S/J/M to be filed. Depos to be taken w/i next 30-45 days. If stip facts not done by middle of May, then date depos last 2 weeks in May. (Mayor Jordan & Lumpkin)

[X] Status Conference [ ] Pre-trial Conference
[ ] By Phone

ORDERED AFTER HEARING:

_____

_____

( ) ORDER TO BE PREPARED BY:
Pltff _____ Deft _____ Court _____
( ) REFERRED TO MAGISTRATE JUDGE _____
_____

FOR_____

(X) CASE CONTINUED TO 6/17/94 @ 8:30 a.m. for further status

OPENING BRIEFS ____ OPPOSITION ____ REPLY ____

Discovery Cut-Off _____

Expert Discovery Cut-Off _____

Pltff to Name Experts by _____

Deft to Name Experts by _____

P/T Conf. Date _____ Trial Date _____ Set for _____ days

Type of Trial: ( ) Jury ( ) Court

NOTES_____
_____
_____
_____

SAN FRANCISCO CHRONICLE, EVELYN C. WHITE
HISTORY OF HOSTILITY:
BIAS FROM WITHIN AGAINST BLACK GAYS

As director of the award-winning San Francisco theater group Pomo Afro Homos, Brian Freeman has introduced audiences around the world to the experiences of gay black men.

The troupe has won honors in its home city. Its dramas have been staged at the esteemed New York Public Theater and recognized by the nation's arts leaders. In Scotland, some in the sold-out theaters were moved to tears by their shows, and the critics raved.

So Freeman was stunned last month when he received word from organizers of a black theater festival in North Carolina that the group would not be invited to an upcoming program.

Why not? Freeman believes that it is because of the Pomo Afro Homos are openly gay, and because male homosexuality has historically evoked ridicule and hostility within black American culture. Today, though, Freeman and thousands of other gay black men are waiting -- some are demanding -- to be accepted by the black community.

"From day one, black people learn that discrimination is going to be a constant in our lives, but it is very painful when you are oppressed by other black people," Freeman said.

Some black gays say homophobia is so deeply entrenched in black culture that it holds a vise-like grip on their lives.

A series of recent incidents has served as blunt reminder:

* Last month, black San Jose Councilwoman Kathy Cole mocked gays and other minority groups in a speech she gave before black political leaders. Backers of a recall drive against Cole say she is hoping to diffuse their efforts by pitting blacks against the area's gay community.

* General Colin Powell, chairman of the Joint Chiefs of Staff, has steadfastly opposed President Clinton's plan to lift the ban on gays serving openly in the military.

* An essay in the New York Times last month by black San Francisco writer Alice Walker suggested that "homoerotic" feelings might have existed among Black Panther leaders, and the idea has provoked an anguished debate.

* A forum on AIDS last February at Morehouse College in Atlanta was canceled after male students denounced homosexuality. Morehouse is one of the nation's most esteemed black colleges and the alma mater of slain civil rights leader Martin Luther King Jr.

Many black social critics say the homophobia can be traced to the days of slavery, when the masculinity of black men was under constant assault. It is reinforced by black ministers who have taken a strong stance against homosexuality and by perceptions that gays have endured less discrimination in a society where sexuality, unlike skin color, can remain hidden.

The effect, some say, is that "manhood" in black culture is too rigidly defined. The stereotype of homosexual men as effeminate and weak violates cultural standards that place a premium on a strong black male identity.

Cornel West, director of afro-American Studies at

Princeton University, says that at a time when black men are perceived as "under siege" by difficult socioeconomic conditions, homosexuality is viewed by many as "a white man's problem" that can only further undermine black men.

"Gay black men who reject the black machismo identity are marginalized in white America and penalized in black America for doing so," West writes in his new book, "Race Matters."

"Gay black men are told they are not really 'black men' if they are not machismo-identified."

Debate over the definition of "masculinity" was a factor in the melee at Morehouse, says Jafari Allen, an openly gay black male who was slated to speak at the February AIDS forum. He says the students who disrupted the event were outraged because he did not meet their standards of manhood.

"In the very chapel where Dr. King sat as a student, black men hurled objects at me and called me a 'faggot'" Allen recalled. "It was terrifying. I still haven't recovered from it."

Black ministers, King foremost among them, have been leading forces in the liberation of oppressed people. But on the subject of homosexuality, some are openly antagonistic. Others, unwilling to speak forthrightly about AIDS, stand silent in their pulpits as their parishioners succumb to the disease.

"'It's sad that people have AIDS and what have you, but it says right there in the scripture that the homosexual lifestyle is an abomination against God,' said the Rev. Eugene Lumpkin, pastor of the Ebenezer Baptist Church in San Francisco. 'So I have to preach that homosexuality is a sin.'"

But the toll of AIDS in the black community has made many gay black men impatient for recognition and acceptance.

According to the Centers for Disease Control, blacks are nearly three times more likely then whites to contract AIDS. A report released last month by the San Francisco Health Department revealed that young gay blacks have the highest HIV infection rate -- 21.2 percent -- in the city, while the rate among Latinos is 9.5 percent, and 8.1 percent among whites.

"My personal struggle with AIDS has forced me to demand respect and dignity from my people," said Reggie Williams, director of the National Task Force on AIDS Prevention in San Francisco.

"Black gay men need to be able to come home. We are not going to just lay down and accept the kind of wounding rejection the Pomo Afro Homos received."

In North Carolina, a spokesman for the theater festival rejected charges that the Pomo Afro Homos -- short for Postmodern African American Homosexuals -- were not invited because members were openly gay.

"We viewed their video and on production values alone, the group was not competitive," said Larry Leon Hamlin, director of The National Black Theater Festival, to be held in Winston-Salem in August.

"I've lost more than a couple of friends to AIDS, so I resent being called homophobic. I think the group is just very sensitive to rejection because of their lifestyle."

In light of the controversy, Freeman and other black leaders

say that black gays are in desperate need of more visible support from mainstream black political and civic groups.

They received it this spring from the NAACP. In an unprecedented show of solidarity with the lesbian and gay movement, the NAACP endorsed April's massive Gay March on Washington.

And Dr. William F. Gibson, chairman of the NAACP's nation board of directors, last week called the festival's rejection of the Pomo Afro Homos "unconscionable."

"As members of a race whose entire history in this country has been marred by persecution and prejudice, we should know better," Gibson said. "I would hope that my black brothers and sisters would develop more tolerance for people who are not exactly like themselves."

A black psychologist who has conducted research on gay black men believes that increased education about sexuality and racial identity is the key to ridding the black community of its bias against gays.

"Gay blacks feel that they are being forced to make a choice between their sexuality or their race," said Kenneth Monteiro, professor of psychology at San Francisco State University.

MAYOR JORDAN'S PRESS RELEASE
July 13, 1993

Mayor Frank Jordan today affirmed his confidence in Reverend Eugene Lumpkin as a member of the Human Rights Commission. Over the past few days, the Mayor has met with Reverend Lumpkin, the African American clergy, Human Rights Commissioners and members of the commission's Lesbian, Gay and Bisexual Advisory Committee.

Today, Mayor Jordan issued the following statement:

"Reverend Lumpkin is and always has been a staunch defender of the principle of human and civil rights for everyone. He has a solid and unambiguous record as a member of the Human Rights Commission. As a commissioner he has protected and advanced gay and lesbian civil rights. Reverend Lumpkin has reaffirmed to me his strongly held belief that civil rights must be extended to all citizens of San Francisco, and as a commissioner he will continue to act to ensure equal justice for members of The City's gay, lesbian and bisexual communities. Reverend Lumpkin also made it clear to me that in no way does he believe [sic] that AIDS is an act of God against anyone.

"What Reverend Lumpkin preaches from his pulpit is a matter of religious belief and, as such, is constitutionally protected by the separation of church and state. What Eugene Lumpkin does as a member of the Human Rights Commission is of my concern. As a member of that Commission his record on gay and lesbian issues is unblemished. As a commissioner, he has served all segments of the San Francisco community with dignity and respect. To this, he assures me, he remains committed.

"San Francisco is a diverse community which spans a wide range of ethnic groups and lifestyles. Wee need to come together and meet on the common ground of understanding.

"Let us put aside our differences and unite around our shared commitment to freedom and justice for all," said Mayor Jordan.

CHANNEL 2 INTERVIEW OF
REVEREND EUGENE LUMPKIN, JR.
August 20, 1993

INTERVIEWER: Thank you, Frank. The time now is 8:15.

It was last June when the Reverend Eugene Lumpkin, a member of the San Francisco Human Rights Commission, told a reporter that homosex -- homosexuality, rather, was an abomination against God. Since then life hasn't been quite the same for the Reverend. Mayor Jordan has stood by his man, but the gay community and the Board of Supervisors are demanding Lumpkin be fired.

The Reverend is with us this morning. Welcome.

LUMPKIN: Good morning, Ross.

INTERVIEWER: What prompted you to quote Leviticus in the first place, in this particular -- why were you asked the question?

LUMPKIN: First of all, I was asked about my stand on gays in the Military.

INTERVIEWER: Mm-hm.

LUMPKIN: And so from there I was asked what were my stand or what my feelings about black men with AIDS and what-have-you.

I shared with them the fact that I -- I have been supportive. I just recently have gone to the hospital to visit a young man

with AIDS and what-have-you.

And so then, I think -- I don't know exactly how, what the words were, but I shared with them that when I go to the pulpit of Ebenezer Baptist Church, I preach the Word of God, and the Word of God says that that lifestyle is an abomination, it's a sin of which they need to repent.

INTERVIEWER: And of course, you know the gay community is outraged. The Board of Supervisors of San Francisco has voted eight to one to urge the Mayor to fire you.

Yesterday Kevin Shelley, a board member, was on the program. I asked him why he voted to have you fired, and he said that he had never met you before, but he had heard that you were a very decent individual, and then he went on to say, and this was his comment:

(Quote from clip):

"SUPERVISOR SHELLEY: He is also though a member of the Human Rights Commission, a Commission that I have some personal history with. My father established it 30 years ago when he was Mayor of San Francisco in an effort to eliminate discrimination in all parts of society. And Reverend Lumpkin, while as a minister he indeed may maintain certain personal beliefs, those beliefs stipulating that homosexuality is a abomination against God are not consistent with being a member of a Commission whose charter mandate it is to eliminate any kind of vestiges of discrimination."

INTERVIEWER: Reverend, your reaction to that.

LUMPKIN: Well, first of all, I'm a minister, a man of God -- I preach the Word. That's my first calling. My other responsibility is one of the Human Rights Commission.

And as I said to the Mayor and said to everyone, look at my record as a Human Rights Commissioner. I have never been, I have never shown any bias, I've not discriminated against anyone, and the only thing that one could suggest is that they know what I'm going to do in the future, which none of us know.

INTERVIEWER: People who have defended you said all you were doing was quoting Scripture, it wasn't necessarily your personal opinion.

LUMPKIN: No, it was not. I'm just the mailman. God wrote the Book. If you've got any problem you have, you see God about it. I merely quoted what thus the Lord. And --

INTERVIEWER: But do you understand the gay community being outraged by the comments? I mean here is an individual sitting on the Human Rights Commission advocating human rights; on the other hand, talking about a -- a good portion of the population, particularly in San Francisco that is gay.

LUMPKIN: Well, it's -- maybe it depends on why I said it, or how I said it. Now, first of all, if I said that homosexual -- or whatever it is -- is a sin, if I said illicit sex is a sin, I say it with the idea that -- I say it with love that the persons who are committing this sin, or whatever they happen to be, may be able to be reconciled unto God. As I said, share it with them, all of us are sin -- sinners, all have sinned and come short of the glory

of God --

INTERVIEWER: Do you believe --

LUMPKIN: -- and need to repent.

INTERVIEWER: -- homosexuality is an abomination?

LUMPKIN: I believe --

INTERVIEWER: Do you believe it?

LUMPKIN: Sure. That -- the Bible say it is.

INTERVIEWER: Do you believe?

LUMPKIN: Sure, I believe. I believe everything the Bible sayeth. All I can understand, (Inaudible).

INTERVIEWER: Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?

LUMPKIN: That what it sayeth.

INTERVIEWER: Do you believe that?

LUMPKIN: That's what God sayeth.

INTERVIEWER: Do you believe that?

LUMPKIN: That's -- I said that's what the Book sayeth.

INTERVIEWER: Do you believe that?

LUMPKIN: Now, first of all, you have to understand the setting. God was at Mt. Sinai with the nation of Israel, who had just come out of bondage 430 years, and God was setting, giving the law on how he wanted them to conduct themselves in the new setting. And He says, "Now, I don't want you acting as the way that they did in Egypt where we came from," and He gave these laws, and said, this is a holy people following a holy God in fellowship, "these are the things you need to refrain from."

INTERVIEWER: The Mayor is standing by you; the Board has asked that you be fired. What do you think the outcome will be?

LUMPKIN: The outcome is already. The Mayor has spoken, and the only thing I'll do is go back to the Human Rights Commission and do a good job, as I have always done.

INTERVIEWER: Well, I will end this by saying everything I have read about you is that you have been fair, you have been very decent, and you've made very unbiased decisions when it comes to your work on the Human Rights Commission.

LUMPKIN: That's (inaudible) --

INTERVIEWER: Thank you for being here this morning. We appreciate it.

LUMPKIN: (Inaudible)

INTERVIEWER: The time now is 8:20. We'll cruise the Bay for a tour of the Rock. More of mornings on 2 just ahead, stay tuned.

(End of interview)

James D. Struck Bar No. 94544
Participating Attorney for
THE RUTHERFORD INSTITUTE
1025 14th Street
Modesto, CA 95354
(209) 578-0165

[Original Filed October 7, 1994]

Brad C. Dacus Bar No. 159690
THE RUTHERFORD INSTITUTE
2700 Gateway Oaks Dr., Ste 200
Sacramento, CA 95833
(916) 646-6299
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REVEREND EUGENE LUMPKIN, JR.,	Case No: C93-4338 FMS
Plaintiff,	**Declaration of Reverend Eugene Lumpkin, Jr. in Opposition to Motion for Summary Judgment**
- vs -	
FRANK M. JORDAN, Mayor of the City and County of San Francisco,	Date: 10/28/94 Time: 10:00 a.m. Crtrm: 9
Defendant.	Judge Fern M. Smith

I, REVEREND EUGENE LUMPKIN, JR., declare:

1. I am the Pastor of Ebenezer Baptist Church in San

Francisco, California, and the plaintiff in this action.

2. I believe, as my denomination and Church teach, that the Holy Bible is the inerrant, infallible and inspired word of Almighty God.

3. During the course of the interview with Evelyn White [see Ex. C], I was asked about my religious beliefs concerning homosexuality, and when I explained that the Bible says that it is an abomination, I was specifically referring to the book of Leviticus, Chapter 18, verse 22, which reads as follows: "You shall not lie with male as one lies with a female; it is an abomination".[2]

4. During a meeting that I had with the Mayor shortly after Ms. White's article was published, I reaffirmed my committed to the Human Rights Commission's mission to eliminate all prejudice and discrimination based on race, religion, color, ancestry, age, sex, sexual orientation, disability, or place of birth. We discussed the fact that I had a solid and unblemished record as a Human Rights Commissioner of upholding both the letter and the spirit of the Charter that created the Human Rights Commission. The Mayor decided to retain me as a Commissioner, and the Press Release from his office dated July 13, 1993 accurately reflects my record as a Commissioner.

5. On August 20, 1993, which was a Friday, shortly after my appearance on the *Mornings on 2* television show, I had a phone conversation with the Mayor, who was in Louisville, Kentucky at the time. The Mayor stated that he had heard that I had said during the television interview that I advocated

---

[2]All quotations from the Bible are from the New American Standard translation.

violence against gays and lesbians, and that he wanted me to resign. I told the Mayor that that was not accurate, that I did not, nor had I ever advocated such violence, and that my remarks, which were concerning a passage in the book of Leviticus in the Bible, were either misunderstood or misinterpreted. The actual passage in Leviticus [chapter 22, verse 13] reads as follows: "there is a man who lies with a male as those who lie with a woman, both of them have committed a detestable act; they shall surely be put to death. Their bloodguiltiness is upon them." When I was asked if I "believed" this passage, I meant that I believed that is what the Bible said, and that the passage did in fact state the law that was in effect at that time; I did not state that I believed that this was now or should be the law, nor did I state that homosexuals should be killed or harmed. I asked the Mayor for an opportunity to explain my position, and arrangements were made for me to have a breakfast meeting with the Mayor on Monday morning, August 23, 1993. The Mayor also indicated during the telephone conversation that he had not seen the program.

6. Between that phone conversation, and the Monday morning breakfast meeting, I conferred with two other local ministers for the purpose of putting together a concise statement explaining the theological relevance of the passage in Leviticus that I was asked about, and a copy of that statement is attached as Exhibit A. This statement accurately sets forth my religious beliefs in this area, and at the August 23 breakfast meeting that I had with the Mayor, I used this information to explain my religious beliefs concerning Leviticus. I reiterated to the Mayor that I was strongly opposed to violence against gays, lesbians and bisexuals, that I did not believe that there should be death penalties against homosexuals, and that I would continue to uphold all provisions of Charter of the

Human Rights Commission - Chapter 12A of the San Francisco Administrative Code. I also offered to assist in any way I could to publicly clarifying my beliefs in this area, and I also believe that I provided the Mayor with a copy of Exhibit A during our meeting. The Mayor continued to insist on my resignation, but I refused to do so, so the Mayor said that he would remove me from my position as a Human Rights Commissioner.

7. Later that same day, I issued my own Press Release, a copy of which is attached as Exhibit B, explaining why I refused to resign and further explaining my religious beliefs.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 30th day of August, 1994, at San Francisco, California.

(Signature)
REVEREND EUGENE LUMPKIN, JR.

MAYOR JORDAN'S PRESS RELEASE
August 20, 1993

"Today I have called on Reverend Lumpkin to resign from the Human Rights Commission.

"While religious beliefs are constitutionally protected and cannot be the grounds to remove anyone from elected or appointed public office, the direct or indirect advocacy of violence is not, cannot and will not be condoned by this administration.

"Reverend Lumpkin, by affirming his literal interpretation of the Bible this morning on a television talk show, implied that stoning to death was the appropriate punishment for violation of 'God's law' as stated in the Book of Leviticus.

"His direct response 'That is what the Bible teaches' to the question whether or not stoning is justified punishment for homosexuality is insufficient to distance himself from the violence inherent in the biblical passage.

"The Scopes Trial II quality of whether or not a literal or symbolic interpretation of the Bible is appropriate, is a philosophical question which scholars can debate. As long as I am mayor, no one in this administration or who represents this office by serving on a Commission, will remain in their post it they directly or indirectly advocate aggression against any person or group of people.

"It is intolerable, indefensible and inexcusable for anyone in San Francisco -- a city that is struggling to free itself of hate crimes -- to be associated with statements be they biblical or otherwise, which justify violence.

"On the grounds of religious freedom and an unblemished record as a Human Rights Commissioner, I have supported Reverend Lumpkin for holding fundamentalist beliefs which are not my own. We part company when those beliefs imply that attacks against anyone can be justified by the scripture or on any other grounds," said Jordan.

Reverend Lumpkin is scheduled to meet with the Mayor Monday morning.

MAYOR JORDAN'S PRESS RELEASE
August 23, 1997

Mayor Frank Jordan today removed Reverend Eugene Lumpkin as a member of the San Francisco Human Rights Commission.

Mayor Jordan acted after being informed that Lumpkin implied on a morning television interview show that stoning to death of homosexuals was a part of his biblical beliefs.

So informed, Jordan telephoned Lumpkin from Louisville, Kentucky where he was presiding over a committee of the United States Conference of Mayors, and asked for the Commissioner's resignation.

Mayor Jordan issued the following statement:

"The Human Rights Commission Charter specifies a broad based diversity on the panel. Traditionally, a minister has been one of its members. I have not in the past, not will I in the future ask that a religious litmus test of beliefs be a part of the appointment process for any San Francisco Commission.

"I will demand that anyone who serves on the Human Rights Panel publicly and privately uphold the principles of justice and equality for everyone. Further, I will continue to insist that my appointee vigorously support the enforcement of hate crime statutes -- as well as laws against unlawful discrimination in all forms.

"Columnists, crusaders and converts have found solace in the United States Constitution. I am sworn to uphold that Constitution as well as the Charter of the City and County of

San Francisco.

"In so doing, I am bound by what can and cannot be done as a matter of law. Religious beliefs are still sacrosanct in this country and are given the broadest range of protection. But when those beliefs are volunteered in a way that negatively influences the operation of a state function, or suggests a justification for actions which may lead to violence, I believe it crosses the line between church and state.

"Reverend Lumpkin chose to make his beliefs a part of the political process, and in so doing crossed the line from belief to behavior advocacy. Reverend Lumpkin, by failing to disassociate himself from specific biblical passages which may appear to justify stoning persons or groups of people, implied that he condoned physical harm.

"In refusing to resign, Reverend Lumpkin has left me no other alternative but to remove him from the Human Rights Commission. This is an action I regret to take because Reverend Lumpkin has a long history of public service. However, no person will be allowed to serve in my administration whose actions may be interpreted by some to encourage violence or give support to others who seek to justify their hatred.

"In addressing an angry mob about to stone Mary Magdalene to death, Jesus once said, 'Let he who is without sin cast the first stone.' I hope the lessons of tolerance and understanding can come out of this incident from which we as San Franciscans can all grow."

BOARD OF SUPERVISORS RESOLUTION
Supervisor Hallinan, June 19, 1993

[Eugene Lumpkin]

CALLING ON EUGENE LUMPKIN TO RESIGN AS A MEMBER OF THE HUMAN RIGHTS COMMISSION AND FURTHER CALLING ON MAYOR FRANK JORDAN TO REMOVE EUGENE LUMPKIN FROM THE HUMAN RIGHTS COMMISSION IF HE FAILS TO RESIGN AND TO RESTORE PUBLIC CONFIDENCE IN THE ROLE AND MISSION OF THE COMMISSION ESPECIALLY WITH REGARDS TO LESBIAN AND GAY SAN FRANCISCANS

WHEREAS, members of the Human Rights Commission are charged with providing leadership in the struggle for equal rights, dignity and respect for all San Franciscans; and,

WHEREAS, members of the San Francisco Human Rights Commission are also charged with resolving disputes and providing a forum in which San Francisco residents may come forward without fear of bias; and,

WHEREAS, Eugene Lumpkin, a member of the Human Rights Commission, has made public statements that "the homosexual lifestyle is an abomination against God," attacked laws that protect against discrimination by stating that "I have problems with people trying to set aside and make special laws for this and that" and stated publicly before the Lesbian, Gay and Bisexual Advisory Committee of the Human Rights Commission that he will not represent the lesbian and gay community on the Commission but will "represent the rest of San Francisco"; and,

WHEREAS, Eugene Lumpkin has, by his words and demeanor undermined the role and responsibilities of the Human Rights Commission and his statements and actions have resulted in a lack of confidence in the Commission's ability to perform its duties as expressed by a wide range of San Francisco residents and organizations; and,

WHEREAS, the Lesbian, Gay, and Bisexual Committee of the Human Rights Commission, several members of the Commission and a wide coalition of individuals and community organizations have called for Eugene Lumpkin's immediate resignation or removal from the Commission; and,

WHEREAS, Eugene Lumpkin has refused to resign and Mayor Frank Jordan has failed to take the necessary action to remove Eugene Lumpkin from the Human Rights Commission and failed to uphold the mission of the Human Rights Commission; therefore, be it

RESOLVED, That the Board of Supervisors of the City and County of San Francisco calls on Eugene Lumpkin to resign as a member of the Human Rights Commission; and, be it

FURTHER RESOLVED, That the Board of Supervisors calls on Mayor Frank Jordan to remove Eugene Lumpkin from the Human Rights Commission if he fails to resign, and to restore public confidence in the role and mission of the Commission, especially with regards to the ability of the Commission to consider complaints and lead the community toward equality and respect for all lesbian and gay San Franciscans.

Adopted - Board of Supervisors, San Francisco

August 16, 1993

Ayes:	Supervisors	Alioto Hallinan Hsieh Kaufman Leal Maher Migden Shelley
Noes:	Supervisor	Kennedy
Absent:	Supervisors	Bierman Conroy

I hereby certify that the foregoing resolution was adopted by the Board of Supervisors of the City and County of San Francisco

(Signature of John L. Taylor)
Clerk

File No.
217-93-4

(Undated)
Date Approved

(Unsigned)
Mayor

August 30, 1993

I hereby certify that the foregoing resolution, not being signed by the Mayor within the time limitation as set forth in Section 2.302 of the Charter, becomes effective without his signature in accordance with the provision of said Section 2.302 of the Charter.

Clerk

File No. 217-93-4

WHAT WE BELIEVE ABOUT THE LEVITICAL THEOCRATIC DEATH PENALTIES

1. The Old Testament Hebrew theocracy (direct supernatural rule of God) was a unique period in history. We do not have that theocracy any more. The ritual ceremonies of the Old Testament were bloody and deadly. That is no longer the case for the people of God today. The bloody sacrifices have been fulfilled in the cross of Christ.

2. The officers of the Old Testament theocracy were both civil and ecclesiastical in one. Prophet, priest, and king were officers of the church/state of Israel. The civil officer, i.e., the king, was the "pastor" of the Old Testament theocracy. He was charged with executing unbelievers then just as God will do Himself in the last judgment.

3. The severe penalties of the old theocracy were unique to that period of time. They reflected God's final judgment day; thus, the penalties were final and irrevocable -- death!

4. In the Christian message the coming of Jesus Christ as Messiah to the people of God brought a change in the government of the church/state of Israel, and a change in the administration of God's Kingdom. Although the prohibitions are essentially the same, the penalties are no longer deadly.

5. The New Testament era marked a separation of church and state among the people of God. "Render unto Caesar the things that are Caesar's; and unto God the things that are God's." No longer are the people of God a civil state as in the Old Testament. Hence, no longer are they to carry out civil

penalties for breaking God's law.

6. Jesus acknowledged that His Kingdom was not of this world (Jn. 18:36), and would not be the same as in the old Kingdom. His servants would not fight with sword and sling as in the Old testament. Now Christ's servants would conquer by means of the preaching and persuasion of the gospel message -- not by means of physical force.

7. The death penalties of the Old Theocracy were revoked in the new age of the church. In the old age the Canaanites were to be destroyed for unbelief. Such is not the case in the New Testament. In the new age of the gospel the Church is called to evangelize the unbeliever.

8. Discipline in the present day Christian Church is by excommunication: a spiritual censure -- a spiritual casting out into the "domain of Satan" as it were. However, the proscriptions against sexual sins continue as described in the case of incest in 1 Corinthians 5. Also, in John 8, Jesus said to the woman taken in adultery, "Neither do I condemn you; go and sin no more," indicating that the old penalties were no longer applicable.

Today the church is called to live amidst the immoral of this world and to win them to Christ as Savior and Lord. The gospel message is the means of their reclamation and reconciliation with God. The Apostle Paul testifies that many sinners from all kinds of sins - including sexual - now may find forgiveness through repentance and faith and thus deliverance in Christ. The New Testament ethic, which governs what we preach and teach, forbids violence against others in no uncertain terms. We believe it is the supernatural power of God that changes and transforms lives.

Rev. Eugene Lumpkin, Jr.
Dr. Charles A. McIlhenny
Dr. David C. Innes

UNITED STATES CONSTITUTION
ARTICLE VI, CLAUSE 4

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall be required as a Qualification to any Office or public Trust under the United States.

UNITED STATES CONSTITUTION
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION
AMENDMENT XIV
SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

§ 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CALIFORNIA CONSTITUTION
ARTICLE 1, §§ 4 and 8

§ 4. Religious Liberty

Sec. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

§ 8. Business, profession, vocation or employment; sex, race, creed, color, or national or ethnic origin

Sec. 8. A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.

CALIFORNIA CODE OF REGULATIONS
ARTICLE 1, § 12940(a)

§ 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

CALIFORNIA CODE OF REGULATIONS
§ 12926(c)

(c) "Employer," except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities.

"Employer" does not include a religious association or corporation not organized for private profit.

SAN FRANCISCO ADMINISTRATIVE CODE
CHAPTER 12A, HUMAN RIGHTS COMMISSION
§§ 12A.1 - 12A.4

SEC. 12A.1. FINDINGS. The population of this City and County is composed of people of various racial, religious, and ethnic groups. In this City and County the practice of discrimination on the grounds of race, religion, color, ancestry, age, sex, sexual orientation, disability or place of birth and the exploitation of prejudice related thereto adversely affects members of minority groups.

Such discriminatory practices are inimical to the public welfare and good order in that they: (a) Impede social and economic progress for the entire citizenry by preventing members of minority groups from achieving full development of their individual potentialities and from contributing fully to the cultural and business life of the community: (b) constantly frustrate, degrade and embitter members of minority groups, thereby diminishing their initiative and interests in the community; and (c) tend to create intergroup hostilities and antisocial behavior.

The products of discrimination accumulate continuously, with the result that the social, economic and educational gaps between those suffering discrimination and the majority of the community constantly widen. As a result, mere prohibition of future and present discrimination, while essential, will not reduce the inequalities and disadvantages which a history of discrimination has produced. Accordingly, affirmative remedial action must be initiated, encouraged and coordinated.

Experiences of other urban centers throughout the

nation have proved the need for and effectiveness of commissions empowered to study community race relations problems, to work with interested citizens to develop programs to ameliorate tensions and reduce cultural, social and economic disadvantages and to encourage and coordinate implementation of such programs consistent with the needs and rights of members of both the majority and the minority.

A substantial number of the aforementioned evils in this City and County are beyond the regulation of applicable State law, and insofar as State law is applicable, voluntary compliance therewith should be fostered by a local human relations commission. (Amended by Ord. 75-77, App. 3/4/77)

SEC. 12A.2. DECLARATION OF POLICY. It is hereby declared:

That the policy of the City and County of San Francisco is to act to give effect to the rights of every inhabitant of the City and County to equal economic, political and educational opportunity, to equal accommodations in all business establishments in the City and County and to equal service and protection by public agencies:

That an instrumentality should be established to give effect to such rights, to eliminate prejudice and discrimination because of race, religon[sic], color, ancestry, age, sex, sexual orientation, disability, or place of birth, to inform the inhabitants of the City and County of developments in human relations, to provide expert advice and assistance to the officers, agencies, boards, departments and employees of the City and County in undertaking ameliorative practices to keep eace and good order and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people. (Amended by Ord. 75-77,

App. 3/4/77)

SEC. 12A.3. SCOPE OF ORDINANCE. This ordinance applies to all discriminatory practices and to resulting intergroup tensions specifically covered by the provisions of this ordinance that occur within the territorial limits of or within any agency under the jurisdiction of the City and County of San Francisco and to the extent permitted by law, to activities outside this City and County which resonably[sic] affect such practices and tensions within said territorial limits. Nothing in this ordinance, however, shall be interpreted or applied so as to create any power or duty in conflict with the preemptive effect of any federal or State law.

(a) As used in this Chapter, the term:

"Age" refers to and shall include any person who has attained the age of 40 years and has not attained the age of 65 years.

"Sex" shall mean the character of being male or female.

"Sexual orientation" shall mean the choice of human adult sexual partner according to gender.

"Disability" is a physical or metal impairment which substantially limits one or more major life activities, is regarded as having such an impairment, or has a record of such an impairment.

"Qualified Disabled Employee" shall mean a person able to perform the essential functions of a job with reasonable accommodation. (Amended by Ord. 489-86. App. 12/18/86)

SEC. 12A.4. ESTABLISHMENT; APPOINT-MENT; TERMS; EXECUTIVE SECRETARY. (a) There is hereby established a commission to be known as the Human Rights Commission of the City and County of San Francisco (hereinafter called "Commission"), consisting of 15 members broadly representative of the general public and the employer, labor, religious, racial, age, sex sexual orientation, disabled and ethnic groups in the City and County, to be appointed by the Mayor. Four of the members who are first appointed shall be designated to serve for terms of one year, four for two years, four for three years and three for four years from the date of their appointments. Thereafter, members shall be appointed as aforesaid for a term of office of four years, except that all of the vacancies occurring during a term shall be filled for the unexpired term. A member shall hold office until his or her successor has been appointed and has qualified. The Commission shall elect a chair from among its members. The term of the office as chair of the Commission shall be for the calendar or for that portion thereof remaining after each such chair is designated or elected. The compensation of members of said Commission shall be $25 for each meeting of the Commission actually attended by said members; provided, however, that no member shall be paid for attending more than four Commission meetings in any one calendar month.

(b) The position of Executive Secretary to the Commission shall be established pursuant to and subject to Sections 3.500 and 8.200 of the Charter of the City and County of San Francisco. The person occupying such position shall be appointed by the chair of the Commission with the approval of a majority of the members of the Commission. The position of Executive Secretary to the Commission shall be exempted from the residency and electoral requirements of Section 16.98 of the San Francisco Administrative Code. All staff personnel shall be under the immediate direction and supervision of the

Executive Secretary. (Amended by Ord. 503-83 App. 10/14/83; Ord. 271-89, App. 7/28/89)

Supreme Court, U.S.
FILED
OCT 28 1997
CLERK

No. 97-367

In The

Supreme Court of the United States

October Term, 1997

EUGENE LUMPKIN, JR.,

Petitioner,

v.

WILLIE L. BROWN, Mayor, and the City and County of San Francisco,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DENNIS AFTERGUT
Chief Assistant City Attorney
Counsel of Record
JULIA M. C. FRIEDLANDER
Deputy City Attorney
City and County of San Francisco
1390 Market Street, Fifth Floor
San Francisco, CA 94102
(415) 554-4213

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1308

QUESTION PRESENTED

Whether the First Amendment prevents a Mayor from removing a member of the Human Rights Commission for making public remarks that conflict with the Commission's purpose and are interpreted to condone violence against gay men and lesbians, where the Commissioner's remarks relate to his religious beliefs.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Baz v. Walters, 782 F.2d 701 (7th Cir. 1986) 5

Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995) (en banc) 5

Connick v. Myers, 461 U.S. 138 (1983) 6, 9

Elrod v. Burns, 427 U.S. 347 (1978) 6, 9

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968) .. 5, 6, 8, 9, 10

Rankin v. McPherson, 483 U.S. 378 (1987) 8

Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992) 6

Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989) 8

Tucker v. State of California Department of Education, 97 F.3d 1204 (9th Cir. 1996) 6

Waters v. Churchill, 114 S.Ct. 1878 (1994) 6, 8, 9

STATUTES

S. F. Admin. Code §12A.2 2

S. F. Admin. Code §12A.4 1

S. F. Admin. Code Chapter 12 2

S. F. Charter §3.100 1

S. F. Charter §3.500 1

S. F. Police Code §3307 2

S. F. Police Code Articles 33 and 38 2

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Mayor Willie L. Brown and the City and County of San Francisco ("the City"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 109 F.3d at 1498.

STATEMENT OF FACTS

Under San Francisco's Charter, the mayor appoints the members of the City's Human Rights Commission. S.F. Charter §3.100; S.F. Admin. Code §12A.4; CR 22, ¶5, CR 23.[1] Members of the Human Rights Commission are high-level City officers. Like other City commissions, the Human Rights Commission ("Commission") overseas a department within the executive branch of City government. The Charter gives the members of the Commission broad and final authority to set policy for the department. S.F. Charter §3.500.

In August 1992, San Francisco's then-Mayor, Frank Jordan, appointed Lumpkin to the Commission. Jordan did so knowing that Lumpkin held the position of pastor of Ebenezer Baptist Church in San Francisco. CR 29, ¶4. Indeed, at the time of his appointment, Jordan had known Lumpkin for 15 to 20 years. CR 29, ¶3.

---

[1] The San Francisco voters approved a new Charter in 1996. All references to the San Francisco Charter are to the Charter that was in effect during the events that gave rise to this case.

Upon his appointment, Lumpkin assumed official duties, including the duty to promote equal rights for all without regard to sexual orientation. CR 23, S.F. Admin. Code §12A.2. The City's law set forth the purposes of the Commission as follows:

> [T]o eliminate prejudice and discrimination because of race, religion, color, ancestry, age, sex, *sexual orientation*, disability, or place of birth, to inform the inhabitants of the City and County of developments in human relations . . . and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people.

CR 23, Supp. Excs., Exh. B, S.F. Admin. Code §12A.2 (emphasis added). By law, the Commission hears and decides complaints of discrimination, including those of sexual orientation and AIDS-related discrimination. CR 23, Supp. Excs., Exh. D, S.F. Police Code, §3307.[2]

On June 26, 1993, the San Francisco *Chronicle* quoted Lumpkin as saying: "It's sad that people have AIDS and what have you, but it says right there in the scripture that the homosexual lifestyle is an abomination against God. So I have to preach that homosexuality is a sin." CR 29,

---

[2] The Commission exercises its authority under a variety of San Francisco ordinances, including Articles 33 and 38 of the San Francisco Police Code. These Articles prohibit discrimination based on sexual orientation and AIDS, among other things, in employment, housing and public accommodations. CR 23, Supp. Excs., Exh. D. Chapter 12 of the Admin. Code bans discrimination by the City and its contractors based on, among other things, sexual orientation. CR 23, Supp. Ecs., Exh. B.

¶5 & Exh. B. These remarks provoked controversy about Lumpkin's membership on the Commission, particularly in view of the Commission's role in promoting tolerance toward all persons regardless of their sexual orientation. Citizens and other Commissioners called for his resignation or removal. CR 11, ¶¶3, 4; CR 18, ¶¶2, 4; CR 23, Supp. Excs., Exh. C. As Lumpkin himself admitted, "Mayor Jordan was besieged with demands that he fire me from the Human Rights Commission." CR 23, Exh. A at 1.

On July 13, 1993, after meeting with Lumpkin and other citizens, the Mayor announced he would not remove Lumpkin, CR 29, ¶¶5, 6 & Exh. C. The City's legislative body, the Board of Supervisors, reacted by adopting a resolution calling for Lumpkin's resignation or removal. This resolution was adopted by an eight-to-one vote. CR 23, Supp. Excs., Exh. C. The resolution urged Mayor Jordan to "restore public confidence in the role and mission of the Commission, especially with regards to the ability of the Commission to consider complaints and lead the community toward equality and respect for all lesbian and gay San Franciscans." *Id.*

On August 20, 1993, Lumpkin gave a television interview. CR 29, ¶7 & Exhs. D, E. The interviewer identified Lumpkin as a member of the Commission, and reviewed the controversy about his tenure on the Commission. The interviewer then asked Lumpkin, "Do you believe homosexuality is an abomination?" CR 29, ¶7 & Exh. E at 4-5. Lumpkin replied, "Sure, I believe. I believe everything the Bible sayeth." The following exchange ensued:

ROSS McGOWAN: Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?

MR. LUMPKIN: That's what it sayeth.

ROSS McGOWAN: Do you believe that?

MR. LUMPKIN: That's what God sayeth.

ROSS McGOWAN: Do you believe that?

MR. LUMPKIN: That's – I said that's what the Book sayeth.

ROSS McGOWAN: Do you believe that?

After some silence, Lumpkin stated that God delivered this pronouncement to the nation of Israel after it came out of bondage in Egypt. *Id.*[3]

Later that day, after learning of the interview, Mayor Jordan asked Lumpkin to resign from the Commission. CR 29, ¶8 & Exh. F. The Mayor's news release explained his action: "While religious beliefs are constitutionally protected and cannot be the grounds to remove anyone from elected or appointed public office, the direct or indirect advocacy of violence is not, cannot and will not be condoned by this administration." CR 29, Exh. F.

On Monday, August 23, 1993, the Mayor met with Lumpkin. CR 29, ¶9. When Lumpkin refused to resign, the Mayor removed him from the Commission. *Id.* at ¶¶9, 10 & Exh. G. In a news release, the Mayor stated that his

---

[3] Thus, Lumpkin had four opportunities to clarify his beliefs during this interview and to state clearly that he does not endorse the use of violence against gay men or lesbians.

appointees to the Commission must "publicly and privately uphold the principles of justice and equality for everyone" and "vigorously support the enforcement of hate crime statutes." CR 29, ¶10 & Exh. H. The Mayor explained that Lumpkin's remarks "implied that he condoned physical harm." *Id.* The Mayor concluded that "no person will be allowed to serve in my administration whose actions may be interpreted by some to encourage violence or give support to others who seek to justify their hatred." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner Lumpkin contends that the Court should grant certiorari to decide whether the balancing test set forth in *Pickering v. Board of Education of Township High School District 205,* 391 U.S. 563, 568 (1968) applies to religious speech. Alternatively, Lumpkin contends that the Court should grant certiorari to decide whether the courts below properly applied the *Pickering* test.

Certiorari is not needed. Every circuit that has considered the first issue has come to the same, obvious conclusion: The test for determining whether the government may discipline or terminate an employee based upon his speech is the same whether the speech is religious or nonreligious. *See Baz v. Walters,* 782 F.2d 701, 708 (7th Cir. 1986) (applying *Pickering* test to uphold discharge of V.A. Hospital chaplain who used position to proselytize in a way that disturbed hospital's psychiatric patients); *Brown v. Polk County,* 61 F.3d 650, 658 (8th Cir. 1995) (en banc) ("[*Pickering*] dealt with free speech rather

than the free exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of *Pickering* to the case at hand."); *Tucker v. State of California Dep't of Education*, 97 F.3d 1204, 1210 (9th Cir. 1996) (applying *Pickering* balancing test in reviewing First Amendment challenge to restrictions on a public employee's expression of religious views); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237-1238 (11th Cir. 1992) (applying *Pickering* test to uphold suspension of community affairs worker who, in his private capacity as a minister, "fanned the flames" of racial animosity he was charged with putting out in his governmental job.)

There are two simple reasons for this unanimity. First, religious speech is entitled to the *same* high level of protection as political speech, not to *greater* protection. Political speech "occupies the highest rung of the hierarchy of First Amendment Values." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

Second, the government's interests do not vary according to whether the speech is political or religious. When acting as an employer, the government has a legitimate interest in assuring that the public comments of its employees do not disrupt effective operations or "obstruct[ ] the implementation of policies . . . sanctioned by the electorate." *Elrod v. Burns*, 427 U.S. 347, 367 (1978); *see Waters v. Churchill*, 114 S.Ct. 1878, 1888 (1994) ("The government's interest in achieving its goals as effectively as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it

acts as an employer.") Thus, if a high-level official's public remarks undermine the mission of the agency the official serves, or the public's confidence in the official's ability to carry out that function, the government has the right to discipline the official, whether the speech expresses religious views or not.

Lumpkin's suggestion that a different rule should apply is nonsensical. Were he right, a President could discharge a Secretary of Defense who, *on policy grounds,* publicly opposed a presidential decision to use force in the Middle East, but the same President could not discharge a Secretary of Defense who said he opposed the use of force *based on religious beliefs.* Similarly, a governor could discharge a prison warden who refused to carry out an execution based on *philosophical* opposition to the death penalty but would have to retain a warden who stated a *religious* objection. Or, in a case such as this one, a Mayor would have to retain a Human Rights Commissioner who said he believed in the biblical disapproval of homosexuality, but the Mayor could discharge a Commissioner who opposed homosexuality based on what was written in *Mein Kampf.* The law is not so foolish.

Thus, in this case, the Ninth Circuit was correct when it wrote:

> Because the Human Rights Commission, as the District Court put it, 'formulat[es], implement[s] and explain[s]' the City's anti-discrimination policies, Order at 9, the City has not only a legitimate, but a heightened expectation that its Human Rights Commissioners refrain from speaking publicly in a way that

> mocks the City's antidiscrimination policy. *Compare Rankin v. McPherson*, 483 U.S. 378, 390 (1987) ("The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.") *with Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989) (governmental interest is not furthered by discharge of nonpolicymaking employees who are not in a position to thwart governmental goals). Government employees who occupy policymaking positions may even be removed solely on the basis of political affiliation, whether or not the employees make public statements, because of 'the need for political loyalty of employees, not to the end that effectiveness or efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration. . . . "

109 F.3d at 1501.

Lumpkin offers no persuasive reason why the *Pickering* balancing test should not apply in cases involving religious speech by government officers and employees. The best he offers are out of context quotations from this Court about the absolute protection the Constitution affords to the profession of religious belief. Pet., pp.11-14. Of course, the cases he cites involve situations where the government is acting as the sovereign, not as an employer. *See Waters v. Churchill*, 114 S.Ct. at 1888. Here, the City's actions were not taken against Reverend Lumpkin as an ordinary citizen, but as a high level City official:

> To be sure, when Reverend Lumpkin speaks as a private citizen, he has every right to preach that

> homosexuality is a sin and that Leviticus says that "a man who sleeps with a man should be put to death." CR 29, Exh. E, at 5. But the First Amendment does not assure him job security when he preaches homophobia while serving as a City Official charged with the responsibility of "eliminat[ing] prejudice and discrimination."

109 F.3d at 1500.

Certiorari is equally unnecessary to review whether the courts below properly *applied* the *Pickering* test. There is no reason to depart from the Court's rule against reviewing the alleged misapplication of a properly stated rule of law. Rules of the U.S. Supreme Court, Rule 10. Under well-established law, courts give substantial weight to a public employer's reasonable judgment that an employee's statements disrupt the operation of a public function. *See Waters v. Churchill*, 114 S.Ct. at 1889; *Connick v. Myers*, 461 U.S. at 152.[4] In this case, there is no question about the disruption caused by Lumpkin's statements. Lumpkin himself admitted that the Mayor was "besieged" with demands that he be removed from office after his initial statements about homosexuality were published in the San Francisco *Chronicle*. Given Lumpkin's subsequent televised statements, the Ninth Circuit properly concluded:

---

[4] As the courts below properly noted, a public employer's interest in avoiding disruption of public functions is especially weighty where the employee, like Lumpkin, serves in a polcymaking position. *Elrod v. Burns*, 427 U.S. at 367.

> When we apply *Pickering* and weigh the City's interest in eliminating prejudice and discrimination against Reverend Lumpkin's First Amendment interest in condemning homosexuality as a sin while serving as a voting member of the Human Rights Commission, the conclusion is inescapable that the City's interests prevail. . . . [T]he City's interest in having commissioners who work to promote City policies far outweighs any commissioner's First Amendment interest in publicly expressing views that subvert those policies.

109 F.3d at 1501.

There is no need for review of legal conclusions that are so obviously correct and over which there is no disagreement among the lower courts.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

LOUISE H. RENNE
San Francisco City Attorney

DENNIS AFTERGUT
Chief Assistant City Attorney
Counsel of Record
JULIA M. C. FRIEDLANDER
Deputy City Attorney
1390 Market Street, 5th Floor
San Francisco, CA 94102
(415) 554-4213